SUPREME COURT, U. S.

JUN 14 1968

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NO. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARSON PIRIE SCOTT & COMPANY,
KROCH'S & BRENTANO'S, INC.,
THE FAIR, and RAY BRENNAN,
Petitioners,

v.

JOHN FACTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

HOWARD P. ROBINSON
GEORGE W. MCBURNEY
ARTHUR F. STAUBITZ
11 South LaSalle Street
Chicago, Illinois 60603
Attorneys for Petitioner,
Carson Pirie Scott & Company

Of Counsel:
SIDLEY & AUSTIN

JACK EDWARD DWORK
69 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioner,
Kroch's & Brentano's, Inc.

NARCISSE A. BROWN
WILLIAM F. MCNALLY
140 South State Street
Chicago, Illinois 60603
Attorneys for Petitioner,
The Fair

MRS. ELOISE JOHNSTONE
33 North Dearborn Street
Chicago, Illinois 60602
Attorney for Petitioner,
Ray Brennan

June 14, 1968.

TWENTIETH CENTURY PRESS, INC., CHICAGO 60606

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners Carson Pirie Scott & Company, Kroch's & Brentano's, Inc., The Fair and Ray Brennan pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 13, 1968.

OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment Order of the District Court, which were not officially reported, are set forth in Appendix A hereto. The majority and dissenting opinions in the Court of Appeals have not yet been officially reported and are set forth in Appendix B hereto. The Findings of Fact, Conclusions of Law and Judgment Order of the District Court in the companion case of *Factor* v. *Pennington Press, Inc.*, are officially reported

at 238 F. Supp. 630 (N. D. Ill. 1964) and are set forth in Appendix C hereto.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on March 13, 1968. The petition of Petitioners for rehearing *en banc* was denied on May 10, 1968, by the Court of Appeals for the Seventh Circuit, *en banc*.[1] The jurisdiction of this Court is based upon 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether in disposing of "the fundamental question" of plaintiff's belief concerning the location of his place of birth, the majority below violated Federal Rule of Civil Procedure 52(a) and arbitrarily departed from the accepted and usual course of appellate procedure by:

   (a) Rejecting the District Court's finding that plaintiff was a "wholly untrustworthy witness * * * not acting in good faith;" and

   (b) Substituting its own factual findings for the directly opposite findings of fact which were made by the District Court upon the basis of extensively contested testimony and documentary evidence.

2. Whether, after holding that the District Court erred in allocating the burden of proof or applying a presumption concerning the "good faith" of plaintiff's belief concerning the location of his birthplace, the majority below erred in proceeding to make its own findings concerning the weight

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1. Senior Circuit Judge Knoch voted to grant the petition for rehearing *en banc*. Circuit Judge Cummings did not vote.

and credibility of evidence rather than remanding the case to the District Court with appropriate instructions.

3. Whether, in reviewing the saving provision of the Illinois Limitations Act (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) the Court of Appeals violated the principle of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), by rejecting the only relevant Illinois decisions and the interpretation of similar statutes in other states and in this Court.

STATUTES INVOLVED

The statutory provisions involved are Rule 52(a) of the Federal Rules of Civil Procedure, Title 28 U.S.C. and Sections 14 (which *bars* plaintiff's action) and 24a (the "Saving Statute") of Chapter 83 of the Illinois Revised Statutes (1965). These statutes are set forth in Appendix D hereto.

STATEMENT OF THE CASE

This action was brought by plaintiff John Factor to recover damages for allegedly libelous statements contained in the book, *The Stolen Years*, written by Roger Touhy and Petitioner Ray Brennan.[2] As the present complaint correctly alleges, this action is virtually identical to an action, known as *Factor* v. *Pennington Press, Inc.*, 59 C 1961 (N.D. Ill.) ("1959 Case"), brought by Factor "against these same defendants [including Petitioners herein] on the same claims for relief" (R. 3).[3] In the 1959 Case, the sole basis

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2. Carson Pirie Scott & Company, Kroch's & Brentano's, Inc. and The Fair were defendants, and are Petitioners, herein solely because they allegedly sold copies of *The Stolen Years*.

3. All references to the Appellant's Appendix, which has been filed by Petitioners as a part of the record in this case pursuant to Rule 21 of this Court, will be indicated as "R." followed by the appropriate page number.

of Federal jurisdiction alleged was that Factor was a citizen of the United Kingdom (A-2; R. 3, 17)[4] by reason of having been born in Hull, England, the defendants being citizens of the United States.

The 1959 Case was dismissed, with prejudice, in December, 1964, on the ground, among others, that Federal diversity jurisdiction did not exist "because Factor was a stateless person at the time of filing the 1959 Case and had been born in Russia, not England as he claimed" (A-5). See *Factor* v. *Pennington Press, Inc.*, 238 F. Supp. 630, 634 (N.D. Ill. 1964) (C-8). Plaintiff's appeal in the 1959 Case was aborted on his own motion. (See Order, *Factor* v. *Pennington Press, Inc.*, No. 15049, 7th Cir. (May 20, 1965)).

In September, 1965, Factor filed his present complaint in the same Federal District Court in which he had filed the 1959 Case (R. 21), and alleged diversity of citizenship as a "citizen and resident of the State of California" by reason of his naturalization as a United States citizen in 1963 (R. 2). Petitioners moved to dismiss the present case on the ground, among others, that it was then (and is now) barred, as an Illinois cause of action, by the one-year Illinois Statute of Limitations (Ill. Rev. Stat., 1965, Chap. 83, Sec. 14) (R. 21). It is not disputed that the present suit is barred by the Illinois Statute of Limitations unless the Saving Statute (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) is applicable and available to plaintiff.

In February, 1966, the District Court dismissed this case on the grounds that it was barred by Section 14 of the Illinois Statute of Limitations and that Factor could "derive no benefit from §24a," the Illinois Saving Statute,

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4. All references to the Appendices hereto will be indicated by the letter of the appropriate Appendix followed by the appropriate page number.

because "a 'good faith' requirement is implicit in §24a" and because Factor's prior false "assertion of federal jurisdiction *cannot be laid to error or inadvertence, and was clearly not in good faith*" (R. 13).[5]

However, in March, 1966, on motion by Factor, the District Court vacated that dismissal and subsequently held a hearing on the "limited issue" of Factor's good faith in filing the 1959 Case (R. 15-16). In October, 1966, the District Court again dismissed the present action with prejudice (A-13). The basis of this second dismissal was that "a 'good faith' requirement is implicit in Section 24(a);" that Factor "was not in good faith in claiming in the 1959 Case that he was born in Hull, England, and he did not act in good faith in pursuing that claim *when he knew it to be false;*" and that Factor's action was, therefore, barred by the Statute of Limitations (A-12—A-13). Furthermore, the District Court reaffirmed its conclusion that "Factor was a wholly untrustworthy witness and that the frequent and repeated impeachment of his claim that he was born in Hull, England, makes it impossible to believe either his claim in Court that he was born" there or his documentary statements to the same effect (A-6, A-10).

The Court of Appeals, with Judge Knoch dissenting, reversed that conclusion. Although certain aspects of the opinion of the court below are unclear, the majority unequivocally declared that "The fundamental question now is whether there was in the evidence in the record before the district court a sufficient basis for a reasonable belief by plaintiff that he was born in Hull, England" (B-15). After discussing some of the evidence—in the terms stated in the brief for plaintiff—the majority explicitly reached a "factual result" (B-18) different from that of the District Court and rejected the District Court's finding that plain-

5. Emphasis herein is added unless indicated otherwise.

tiff did not honestly believe in 1959 that he was born in Hull, England (B-18—B-19). The majority also concluded that the District Court incorrectly "imposed upon" plaintiff "the burden of *disproving*" his bad faith in filing the 1959 Case (B-4; emphasis by the court) or incorrectly raised "a presumption of bad faith" (B-13). In addition, the majority concluded that the Illinois Saving Statute has not been or should not be interpreted to include a "good faith" requirement where the plaintiff is guilty of making a knowingly false jurisdictional allegation, as distinguished from "self-initiated delay" (B-15).

The court below erred and its decision should be reversed because it has "departed from the accepted and usual course of judicial proceedings" (Sup. Ct. Rule 19) in that: (1) In conflict with Rule 52(a), decisions of this Court, its own decisions and decisions of other Courts of Appeals, the majority below has arbitrarily rejected the right of the trial court to make findings of fact on conflicting evidence and has summarily substituted its own appellate fact findings for those of the trial court; and (2) it has interpreted the Illinois Saving Statute in conflict with applicable Illinois decisions and with decisions under similar statutes in other states.

REASONS FOR GRANTING WRIT

(1) The majority of the Court of Appeals erred and departed from the prescribed standards of judicial review by arbitrarily negating the inherent right of the District Court to disregard testimony that it found to be untrustworthy. In addition, the majority erred in summarily substituting its own factual findings for those of the District Court by adopting, as true, testimony and evidence rejected by the District Court as "untrustworthy," or "confused" or "uncertain," or based upon plaintiff's "reason to deceive others as to his birthplace."

The majority below resolved the "fundamental question" (B-15) by reaching what it found to be an "inescapable conclusion that plaintiff could have justifiably believed that he was born in England in 1892" (B-18). This conclusion was reached despite Judge Decker's specific findings that (A-10):

> "* * * *the plaintiff is a 'wholly untrustworthy witness.'* His claim that he was in good faith in 1959 in believing that he was born in Hull, England, has been repeatedly impeached. A portion of this impeachment comes from the evidence supplied by members of plaintiff's own family. *On the basis of the complete record, I find that the plaintiff did not honestly believe that he was born in Hull, England, when he asserted this fact in 1959. I further find that the plaintiff was not acting in good faith when he filed the 1959 proceeding* * * *."

Under the requirements of Rule 52(a), those findings by the trial court cannot be set aside unless they are clearly erroneous. As this Court said in *United States* v. *National Ass'n of Real Estate Boards*, 339 U.S. 485, 495-496 (1950):

> "But we cannot say that the District Court was 'clearly erroneous' in finding that the National Association and Nelson were not laced into the conspiracy to fix the commissions in the District of Columbia. * * *
>
> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent [Citing cases]. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

In *Remington Rand Inc.* v. *Societe Internationale Pour Participations Industrielles et Commerciales S. A.*, 188 F.2d 1011, 1013 (D. C. Cir. 1951), the District of Columbia court aptly stated that:

> "It is beside the point that a reviewing court might draw opposite inferences favorable to the contentions of [plaintiff]. That alone would not justify reversal of the present findings [Citing cases]. Where a trial involves disputed factual issues a choice must always be made between opposing versions of the evidence. In this case the law imposed that high duty and responsibility upon the presiding judge. His preferred opportunity for just appraisement of the witnesses and fair comparison and evaluation of the evidence is recognized in the law's command that 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' Fed. R. Civ. P. 52(a)."[6]

It is clear that in this case the trial court's finding that Factor "did not honestly believe that he was born in Hull, England, when he asserted this fact in 1959" could not be set aside by the court below "unless clearly erroneous." There is, and there can be, no question that this finding was based upon extensive and substantial evidence. Here, Judge Schnackenberg arbitarily departed from the correct rule announced by him in *A. L. B. Theatre Corp.* v. *Loew's Inc.*, 355 F.2d 495, 499 (7th Cir. 1966), that "We are not at liberty to disturb the trial court's choice between opposed, permissible inferences whenever from the evidence conflicting inferences may be drawn." Here as in *Gary Theatre Co.* v. *Columbia Pictures Corp.*, 120 F.2d 891, 894 (7th Cir. 1941), "It matters not that we might have arrived at a conclusion at variance with that of the trial court."

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6. In *Metalexport Co.* v. *Gen-O-Ral Processing Corp.*, 365 F.2d 178, 180 (7th Cir. 1966) Judge Schnackenberg, who wrote the majority opinion in the present case, was joined by Judge Swygert, the other member of the majority here, in correctly stating the rule that " • • • this court will not disturb the findings of the district court unless they are manifestly against the weight of the evidence."

Here, as in *Remington Rand,* "It is beside the point that [the court below] might draw opposite inferences favorable to the contentions of [plaintiff]."

It clearly was the duty of the court below "to refrain from attempting to substitute its findings for those of the trial court" (*Gary Theatre* at 894).

Completely disregarding this duty, the majority below summarily substituted its own factual findings for those of the District Court and adopted, as true, testimony and evidence specifically rejected by the District Court as "untrustworthy," "confused" or "uncertain," or based upon Factor's "reason to deceive others as to his birthplace." In doing so, the majority relied upon the following (B-4—B-9):

—The oral testimony of Factor.

—Various affidavits executed in 1932 or earlier.

—The deposition testimony of Factor's sister, Dena Lupu.

—The testimony of Factor's former lawyer, George Gilbert.

—The testimony of Factor's nephews and his son.

That Factor's evidence relied upon by the majority below was discredited upon cross-examination and affirmatively disproved by Petitioners' evidence is demonstrated by the record. What must be considered here are the District Court's findings, based upon such evidence, which were summarily upset by the Court of Appeals.

As to the testimony of Factor, Judge Decker has had the opportunity to assess Factor's credibility on two occasions and on each occasion has concluded that Factor, because of "frequent and repeated impeachment," is "impossible to believe" (A-6, A-10). As Judge Decker also noted, "Factor readily admitted that he made misstatements of facts in [Petititoner's Exhibits] to suit his convenience at the vari-

ous times that the statements were made" (A-9). Accordingly, the District Court properly could, as it did, refuse to believe Factor's testimony and the majority below should not have summarily overturned the finding of the trial court.[7]

The same affidavits introduced in this case by Factor were used by him in the 1931 case of *Faber, et al.* v. *Foreman Trust and Savings Bank, et al.*, No. 10538 (N.D. Ill. 1931) ("Faber Case").[8] The Faber Case involved Factor's first unsuccessful attempt in a Federal court to prove British citizenship (A-7). The District Court in the Faber Case rejected these affidavits in 1932 on the ground that Factor had *"an overwhelming motive"* in that case to deceive others as to the location of his birthplace (R. 23, 278). Similarly, Judge Decker, in considering those same affidavits in the present case found that (A-8):

> "All of the documents introduced by Factor were executed after Factor had a reason to deceive others as to his birthplace—namely, his need to protect a fraudulently obtained British passport—and eight of those documents were executed after plaintiff had a second reason to deceive—namely, his assertion of British citizenship in the *Faber* case."

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7. See *Adair* v. *Shallenberger*, 119 F.2d 1017, 1019 (7th Cir. 1941):

"It seems obvious that, having observed them [two witnesses] upon the witness stand, and having concluded that they had testified falsely in certain material respects, it [the District Court] relied upon the rule that a witness once impeached by incontrovertible evidence may be disbelieved in the entirety of his testimony. In such situation courts of review will not interfere with the finding of the trial court, who had full opportunity to observe the witnesses and all surrounding circumstances affecting their credibility."

8. See A-7—A-9.

Nevertheless, despite the rejection, by a District Court in 1932 and again by Judge Decker in this case, of affidavits presented by Factor, the majority below accepted them as true.

Moreover, Judge Decker found that the affirmative evidence of Petitioners was far more persuasive (A-9):

> "In contrast, *several of the defendants' exhibits were executed prior to 1918*—namely Factor's Illinois Marriage License Application, Factor's Illinois Barber's License Application, Jerome Factor's Birth Certificate, Factor's Declaration of Intention to become a United States citizen, Factor's draft card, and the manifest of the S. S. Haverford—*at a time when Factor had no reason to deceive. All of those documents show that Factor's birthplace was stated as Russia or Poland,* which was then under Russian domination."

Judge Decker also could and properly did disregard the deposition testimony of plaintiff's sister, Dena Lupu, as being "confused and uncertain testimony" to which the trial court could "give little, if any, credence" (A-8).

The testimony of Factor's former lawyer, George Gilbert,[9] in this case consisted merely of repeating what Factor and various members of Factor's family told Gilbert in 1928 and 1932, and of identifying the affidavits prepared for use in the Faber Case. Factor's assertions to Gilbert properly were disregarded by Judge Decker. Since the affidavits identified by Gilbert merely incorporate the alleged substance of what Factor's relatives told Gilbert orally, and since the District Court could and did properly characterize these affidavits as "self-serving" (A-8), Gilbert's testimony was of no significance.

Similarly, the testimony of Factor's nephews and son all related to events occurring in 1924, or thereafter (Fac-

9. See A-7.

tor having obtained his fraudulent passport in 1923),[10] at times when the witnesses were children, and such testimony merely repeated statements allegedly made by various of Factor's relatives more than forty years prior to the hearing in this case.

As the Seventh Circuit said in *Sun Life Assurance Co. of Canada* v. *Stacks*, 187 F.2d 17, 20 (7th Cir. 1951):

> "The trial judge has the function of finding the facts, weighing the evidence, and choosing from among conflicting factual inferences and conclusions those which he considers most reasonable, and *he has the inherent right to disregard the testimony of any witness when he is satisfied that the witness is not telling the truth or her testimony is inherently improbable due to its inaccuracy, uncertainty, or interest or bias.*"

In the face of the express requirement of Rule 52(a) and of overwhelming authority in this Court, in the Seventh Circuit and elsewhere that (a) findings of fact shall not be set aside unless clearly erroneous, and that (b) the trial judge has the function of finding the facts, weighing the evidence and choosing from among conflicting factual inferences and conclusions those which he considers most reasonable, the majority below usurped Judge Decker's function and summarily substituted its own findings of fact for those of the trial court.

(2) The majority opinion also holds that the District Court erred in allegedly imposing on Factor "the burden of *disproving defendants' charges of bad faith*" (B-4; emphasis by the court). Even if this holding were correct—which it is not—[11] the majority of the Court of Appeals

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10. See A-5, A-8.

11. In fact, the only burden imposed upon Factor was that he "go forward" first with his evidence on his own motion to vacate the District Court's prior judgment order of dismissal (R. 30) in

erred in substituting its own findings of fact for those of the District Court. Since the majority found that Judge Decker had misallocated the burden of proof, it should have remanded the case to the District Court with instructions to evaluate the evidence in accordance with the burden of proof as the majority found it.

(3) The majority of the Court of Appeals erred in holding that the Illinois Limitations Saving Statute (Ill. Rev. Stat., 1965, Chap. 83, Sec. 24a) does not require that a plaintiff seeking its benefits have made his prior jurisdictional allegations honestly or in good faith. Such an interpretation conflicts with the statutory purpose and with Illinois Supreme and Appellate Court decisions. The rejection of the "good faith" test by the majority below places the Seventh Circuit on record as the only court to reject the requirement in the thirty-one states having Saving Statutes similar to Section 24a.[12]

The "good faith" test appears to have been first suggested by this Court in 1883 in construing a Tennessee statute similar to that in issue here. In *Smith* v. *McNeal*, 109 U.S. 426, 430 (1883) this Court said:

> "Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bring-

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which motion plaintiff had requested the opportunity to "present evidence in support of his good faith belief" of English citizenship (R. 15). Furthermore, under Illinois law, Factor, as one seeking the benefit of an exception to the Statute of Limitations, had the burden of proof. See *O'Hara* v. *Carrillo*, 20 Ill. App. 2d 304, 155 N.E. 2d 850 (1st Dist. 1959).

12. In addition to Illinois, the courts of Arkansas, Kansas, Kentucky, Massachusetts, Missouri, Montana, New York, Oklahoma, Tennessee and Virginia have construed the saving statutes in those states as requiring "good faith." See *Annot.*, 6 ALR 3d 1043, 1045 (1966).

> ing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

Contrary to the majority below, the Illinois courts do not find the "good faith" requirement, established in Illinois in *Sachs* v. *Ohio Nat. Life Ins. Co.*, 131 F.2d 134, 137 (7th Cir. 1942), to be mere *"obiter dictum"* or to be an "additional requirement" that must be rejected. Instead, it repeatedly has been included in Illinois state court decisions construing the Saving Statute. See *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 N.E. 2d 415 (1964) (citing with approval the *"obiter dictum"* in *Sachs*); *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965); *Swiontek* v. *Greenstein*, 33 Ill. App. 2d 355, 179 N.E. 2d 427 (2d Dist. 1961); *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 263 (2d Dist. 1961).

The Appellate Court of Illinois, for example, did not reject, as an "additional requirement," the obligation that a plaintiff seeking the benefits of the Saving Statute may not be guilty of self-initiated delay. *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965). There, the Appellate Court affirmed the dismissal of the re-filed complaint of a plaintiff who, like Factor, came within the *letter* of the Saving Statute, and said (57 Ill. App. at 273-274, 205 N.E. 2d at 486):

> "Plaintiff urges that the trial court erred in dismissing his complaint filed pursuant to section 24. *We believe that plaintiff comes within the letter, but not within the spirit and intent of this section.* It is a remedial section which seeks to protect a plaintiff, who *brings an action in good faith*, from complete loss of relief on the merits because of a procedural defect."
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> • • •

"The spirit of a statute will control over the letter of the enactment where there is a conflict."

In *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 263 (2d Dist. 1961),[13] the Illinois Appellate Court was faced squarely with the "good faith" requirement in considering defendant's contention that plaintiff had made a jurisdictional allegation in bad faith. In that case, plaintiff's first libel suit was brought in Federal District Court as a diversity action between himself as a citizen of Illinois and the defendant newspaper as a Delaware corporation. The District Court "dismissed the complaint because defendant has its principal place of business in Illinois and there is no diversity of citizenship." After the Statute of Limitations had run, plaintiff sued in state court. In support of its motion to dismiss, defendant argued "that the relief provisions of the Limitations Act are not available to a party who does not act in good faith." In considering this position, the Appellate Court stated:

> "Defendant's counsel argues that since plaintiff knew that defendant published a newspaper at Rockford, he must have known that its principal place of business was there, and therefore his action in the Federal court was not commenced in good faith.
>
> • • •
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> *"It does not necessarily follow* that defendant's principal place of business was in Rockford because it published a newspaper there, or *that plaintiff did not act in good faith when he sued defendant in the Federal court under this mistaken belief that there was diversity of citizenship."*

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13. *Lundstrom* is reported as an abstract opinion only. The full text of the opinion is found in Appendix E hereto and is part of the record below.

The Illinois Appellate Court did not reject the "good faith" test as *"obiter dictum;"* rather, the court applied the test and found that Lundstrom had met it. Although *Lundstrom* was discussed at some length in defendants' brief filed with the Seventh Circuit (pp. 19-20), the majority below ignored *Lundstrom* and stated (B-12—B-13): "We have been cited to no decision of any federal court or of any Illinois court which has superimposed this [good faith] burden upon one who seeks to take advantage of § 24(a)." Obviously, *Tidwell* and *Lundstrom* are controlling in the court below and in this Court. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938); *Wells* v. *Simonds Abrasive Co.,* 345 U.S. 514 (1953).

The majority below also ignored the case of *Hardin* v. *Cass County,* 42 Fed. 652 (C.C. W.D. Mo. 1890), which dealt with the effect of fraudulent jurisdictional allegations in connection with a plaintiff's effort to obtain the benefits of a Saving Statute similar to Section 24a. In that case, the court stated (42 Fed. at 654-655):

> "No impartial eye can read any of the decisions in question without discovering that the existence of good faith on the part of the actor in the first action instituted is the basis of the 'equitable construction' given the [Saving] Statute.
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> * * *
>
> "The statute in question, as all the courts say, should be equitably construed, as its purpose is to protect *honest* suitors. As it is designed to accomplish the ends of justice, *ex aequo et bono,* it is to be presumed that, whenever and wherever it should be made to appear to the court administering the statute that there was no mistake of fact, no misapprehension of law in the mind of the actor in first selecting his remedy or the forum, but that he took the course he did knowingly to evade the law and obtain an unauthorized judgment, the court would say to such a suitor: You are not within

the equity of the statute. *It was designed to promote justice, and not to aid fraud on jurisdiction.*"

In *Hardin,* plaintiff sued upon four bonds, two of which he knew did not exist. The total amount of the two bonds which did exist was insufficient to satisfy the minimum Federal jurisdictional requirement. The court observed (42 Fed. at 656): *"In the case at bar there was not only an 'inherent want of jurisdiction in the court in which it [the suit] was brought,' but the plaintiff knew it, and sought to evade the admission of the legal fact on the face of his petition by declaring on two other bonds he did not have, and which were not in existence."* The court then concluded (42 Fed. at 656-657):

> "It certainly is in the legitimate line of carrying out the spirit of both statutes under consideration [the Saving Statute and a Federal jurisdiction statute] to leave where he has voluntarily placed himself the suitor who has sought to misuse, and abuse the jurisdiction of this court to obtain its aid in the collection of a claim not cognizable by it. With full knowledge of his rights, the plaintiff saw fit to let the statute of limitations run against his demand while he was juggling with the court and the defendant; and he ought not to expect the same court to invoke the spirit of 'equitable construction' to release him from the trap he sprung on himself. * * * I feel constrained, therefore, to hold that the statute of limitation has also run against the cause of action stated in the third count of the petition."

Despite the fact that the majority below is prepared now to cast aside as *"obiter dictum"* a twenty-six year old "good faith" requirement in the Illinois Saving Statute, that requirement nevertheless has been applied and repeatedly approved by the Supreme and Appellate Courts of Illinois.

To discard the "good faith" test not only refuses to follow Illinois judicial authority but also means that the Sav-

ing Statute does and will protect dishonest and fraudulent, as well as honest, plaintiffs. Is it appropriate to preclude from the benefits of the Saving Statute a plaintiff who is guilty merely of delay, as in *Tidwell*, while at the same time granting those benefits to one, such as Factor, who has been found by a trial court to have been guilty of perpetrating a fraud in an effort to create a basis for Federal jurisdiction? If so, delay has become a more serious infraction of legal requirements than perjury. If Factor dishonestly attempted, as Judge Decker found that he did, to invoke Federal jurisdiction in his 1959 Case, the refusal of the majority below to apply the "good faith" requirement has the effect of stamping judicial approval upon Factor's attempted fraud.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HOWARD P. ROBINSON
GEORGE W. MCBURNEY
ARTHUR F. STAUBITZ
Attorneys for Petitioner,
Carson Pirie Scott & Company

NARCISSE A. BROWN
WILLIAM F. MCNALLY
Attorneys for Petitioner,
The Fair

Of Counsel:
SIDLEY & AUSTIN

MRS. ELOISE JOHNSTONE
Attorney for Petitioner,
Ray Brennan

JACK EDWARD DWORK
Attorney for Petitioner,
Kroch's & Brentano's, Inc.

June 14, 1968.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN FACTOR, Plaintiff, vs. CARSON PIRIE SCOTT & CO., et al., Defendants.	No. 65 C 1558

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

This case having come on for hearing on plaintiff's motion to vacate the judgment order of this court entered on February 17, 1966, dismissing this cause as to all defendants, and the court having vacated such judgment order to permit plaintiff to introduce evidence limited solely to the issue of plaintiff's good faith in filing a prior action known as *Factor* v. *Pennington Press, Inc., et al.*, 59 C 1961, Northern District of Illinois, and the court having considered the complaint, the motion of certain defendants to dismiss and briefs on the law, having heard evidence produced in open court and the oral argument of counsel, and being fully informed in the premises, enters the following Findings of Fact and Conclusions of Law pursuant to the provisions of Rule 52(a) of the Federal Rules of Civil Procedure:

Findings of Fact

1. On December 9, 1959, the plaintiff, John Factor ("Factor"), filed an action for libel and invasion of privacy

against the defendants herein (and others, not parties to the present action) known as *Factor* v. *Pennington Press, Inc.*, 59 C 1961, Northern District of Illinois ("1959 Case"). The complaint in the present case is virtually identical to the complaint in the 1959 Case and the 1959 Case included as defendants all of the parties defendant in this case.

2. Factor alleged diversity jurisdiction in the 1959 Case upon the basis of his claim that he was then a citizen of the United Kingdom by virtue of having been born in Hull, England, and that the defendants were citizens of the United States. The defendants moved to dismiss the 1959 Case on the ground that Factor was not a citizen of one of the United States or of a foreign state at the time that he filed the complaint therein, and a trial on that jurisdictional issue was held before this court on December 14 and 15, 1964.

3. During the course of that trial, Factor was called as an adverse witness by the defendants and testified that he was one of nine or ten children born of his father's second marriage to his mother, Leah Factor. Factor admitted that all eight of his full brothers and sisters were born in Russia, most of them having been born in Lodz, Russian Poland. Factor testified that his father was an itinerant rabbi, who spent six or eight months in England where Factor claims he was born. However, Factor admitted that in a prior sworn affidavit he had stated that his father's sojourn in England was for only two or three months' duration (12-14-64 tr. pp. 166-167).

4. In the 1959 Case, Factor admitted making an application for a marriage license to one Bessie Schatz on August 7, 1911, which was admitted in evidence (DX-1). He admitted signing this application in the name of Jack Factor. This application, made under oath, stated Factor's birth date as October 8, 1889, and did not state the place of

his birth. Factor also testified that, although he was only nineteen when he made that application, he falsely stated his age as twenty-one because he "thought that it [the age necessary to obtain a marriage license] would have to be twenty-one" (12-14-64 tr. p. 108).

5. In the 1959 Case, Factor admitted making, under oath, an application for a barber's license in the State of Illinois in 1912, which he signed as Jack Factor and in which he stated that his birth date was 1889 or 1890 and that he was born in Russia (DX-2). Factor stated that, "I merely took it for granted where I was born," at the time he filed and signed this application (12-14-64 tr. p. 110).

6. In the 1959 Case, Factor stated that he did not recall ever having given anyone the information necessary to fill out a certificate of his son Jerome's birth in the State of Illinois. This certificate, which was admitted in evidence (DX-3), showed Factor's name as "Jack Factor," stated his birth date was 1891 or 1892 and his birth place Russia. The certificate is dated November 16, 1913, and Factor admitted that at that time he was under the impression that he was born in Russia and probably told that to his wife, Bessie Schatz Factor (12-14-64 tr. p. 115).

7. In the 1959 Case, Factor admitted signing, under oath, on February 27, 1917, a declaration of intention to become a United States citizen (DX-4). Factor signed this declaration in the name of Jacob Factor, stated that his birth date was December 15, 1892, and that he was born in Zdunska, Russia. In this declaration, which was sworn to before the Clerk of the United States District Court for the Northern District of Illinois, Factor stated that it was his intention to renounce allegiance to the Czar of Russia of whom he was then a subject.

8. In the 1959 Case, Factor admitted signing, under oath, on June 5, 1917, a draft card in the name of J. Factor

for the United States Selective Service System during the First World War (DX-5). On this draft card, he stated that he was born on October 8, 1890, in Lodz, Russian Poland. In open court, Factor testified, on December 14, 1964, that the facts contained on the draft card "are correct and . . . are in my handwriting." (12-14-64 tr. p. 75).

9. In the 1959 Case, Factor testified that, until 1918 or 1919, he believed that he was born in Russia. Factor asserted that sometime in 1918 or 1919 he learned, through conversations with his parents and older brothers, that he was born in England (12-14-64 tr. pp. 34, 111).

10. In the 1959 Case, Factor admitted signing, under oath, in the name of Jacob Factor, an application for a second marriage license in the State of New York, on February 6, 1925 (DX-6). In this application Factor stated that he was born in 1892 or 1893 in Chicago, Illinois, and that the marriage was his first. When he was asked what he hoped to accomplish by stating that he was born in Chicago, Illinois, in this application, he stated, "Well, I was here on a visa, a short time visa, and I was hoping to get married immediately, and I was afraid that if I put down that I was born in England, I might have to wait a week or two weeks, or longer, I did not know." (12-14-64 tr. pp. 124-125).

11. A birth certificate of Alvin J. Factor, the youngest son of Factor, also was received in evidence in the 1959 Case, signed by the Registrar of the Chicago Lying-In Hospital, dated December 25, 1925 (DX-7). The certificate stated that the father was Jack Factor and that he was born in 1892 in Chicago, Illinois.

12. In the 1959 Case, a manifest of the ship S. S. Haverford was admitted in evidence (DX-8). This manifest showed that the ship sailed from Liverpool, England, on

March 7, 1906, and arrived at Philadelphia, Pennsylvania, on March 22, 1906. The manifest states that Abraham J. Factor (Factor's father), Leah Factor (Factor's mother), Dena Factor (Factor's sister) and Factor were on board as aliens. It listed their destination as 1513 Biddle Street, St. Louis, Missouri, the home of Nathan Factor, and stated that Factor's father had four children in St. Louis. Although Factor did not sign this manifest, and testified that neither he nor his parents nor his sister could speak English at this time, when Factor was asked by the court how old he was in 1906 when he arrived in the Port of Philadelphia, he stated "about eleven, I believe." When the discrepancy between this statement and his claim that he was born in 1892 was pointed out to him, Factor testified that he just could not remember things that occurred that long ago (12-14-64 tr. pp. 84-86, 127-128).

13. In the 1959 Case, Factor testified that the first written statement of his alleged British birth was made when he obtained a Canadian passport as a British subject in 1923 (12-14-64 tr. p. 165). This document (PX-14) also states in consular endorsements dated June 10, 1924, and September 23, 1924, that Factor was born in Canada (PX-14, pp. 10, 12).

14. The 1959 Case was dismissed with prejudice on December 23, 1964, on the ground, among others, of lack of diversity jurisdiction, because Factor was a stateless person at the time of filing the 1959 Case and had been born in Russia, not England as he claimed. This court's findings of fact and conclusions of law in support of the order of dismissal are reported in *Factor* v. *Pennington Press, Inc.*, 238 F. Supp. 630 (N.D.Ill. 1964). No appeal was taken from this order. In the course of that opinion, I stated:

"I find that the plaintiff Factor was a wholly untrustworthy witness and that the frequent and repeated impeachment of his claim that he was born in Hull, England, makes it impossible to believe either his claim in Court that he was born in Hull, England, on October 8, 1892, or his statements made in the various documents summarized above to the same effect." 238 F.Supp. at 633.

15. On September 16, 1965, Factor filed the present action. On December 3, 1965, certain of the defendants herein moved to dismiss the present case on the ground, among others, that this action is barred by the Statute of Limitations. This action was dismissed on that ground on February 17, 1966, as to all defendants. Subsequently, on plaintiff's motion, the judgment order of dismissal was vacated on March 23, 1966, and this cause was set down for hearing on the limited issue of whether Factor, in filing and in defending this Court's jurisdiction in the 1959 Case, acted in good faith in asserting that he was a citizen of Great Britain.

16. On May 27, 1966, testimony and the deposition of Dena Lupu were received on this issue by the Court, sitting without a jury, and the Court has admitted into evidence, under its powers to take judicial notice, the entire trial transcript and all of defendants' exhibits admitted into evidence during the hearing in the 1959 Case.

17. In the present case, Factor claims that he acted in good faith in filing his 1959 suit in which he claimed he was born in Hull, England, because various members of his family told him that this was the place of his birth.

18. In support of this claim, Factor offered the testimony of himself (5-27-66 tr. pp. 116-141), his son Jerome Factor (5-27-66 tr. pp. 83-108), and George C. Gilbert, Jr. (5-27-66 tr. pp. 17-68), who was Factor's attorney in a

fraud action against Factor known as *Faber, et al.* v. *Foreman State Trust and Savings Bank, et al.*, No. 10538, Northern District of Illinois ("Faber Case"). Factor's brother Frank, who is still alive, did not testify.

19. In addition to the foregoing evidence, Factor introduced the deposition of his sister, Dena Lupu, and several affidavits in evidence (PX-1 through PX-10), the purport of which is that Factor was born in England and that this fact was "always known" to his family.

20. All of the foregoing affidavits (PX-1 through PX-10) were filed by Factor or his co-defendants in support of various motions to dismiss for want of jurisdiction or for rehearing in the *Faber* Case. The gist of those motions was that the court lacked jurisdiction because both the plaintiffs in the *Faber* Case and the defendant John Factor (plaintiff in this case) allegedly were citizens of England. Those motions were denied.

21. Factor testified that he first saw the affidavit of Solomon Schultz (PX-9) in 1924 or 1925 (5-27-66 tr. p. 117) and then subsequently admitted that such affidavit was dated March 23, 1928 (5-27-66 tr. p. 120).

22. George G. Gilbert, Jr., testified that he or one of his associates interviewed Max, Daniel, Nathan and Leah Factor in connection with the preparation of the affidavits described in Finding 19 above. Contrary to Factor's own prior testimony and sworn documents, Gilbert testified that, on all occasions following such interviews, Factor repeated in substance that he had "always believed and thought" that he was born in England.

23. Dena Lupu testified that she lived in the Factor family home until 1908 or 1909 (Lupu Dep. 5), and that her parents had told her "around the house when we were home" that Factor was born in England (Lupu Dep. 8),

and again, contrary to Factor's prior testimony, that Factor "always knew that he was born in England" (Lupu Dep. 10). Subsequently, Mrs. Lupu testified that these conversations took place in Poland prior to 1906 and thereafter in St. Louis, Missouri; that Factor was "always" present at these conversations (Lupu Dep. 47); and that, except for Factor's birthplace, she could not remember any other topic of conversation (Lupu Dep. 48).

24. Dena Lupu, during her examination, could not definitely state her age (Lupu Dep. 4); her date of entry into the United States (Lupu Dep. 5); the port of entry (Lupu Dep. 15); the date of her first marriage (Lupu Dep. 5); the specific time of any conversation concerning Factor's birthplace (Lupu Dep. 8); the date her brothers and sisters left the family home in Poland to come to the United States (Lupu Dep. 27); the date of her second marriage (Lupu Dep. 36); the name of her aunt, Shewie Dobredsky (Lupu Dep. 38); whether Factor resided in Canada (Lupu Dep. 40); or the date of Factor's second marriage (Lupu Dep. 42. I can give little, if any, credence to this confused and uncertain testimony.

25. Factor could not, as a Russian citizen, obtain a Soviet passport in either the United States or Canada in 1923 (12-15-64 tr. pp. 207-208).

26. The only evidence supporting Factor's claim that he believed in good faith on December 9, 1959, and thereafter, that he was born in England consists of Factor's own self-serving statements that he learned of this in 1918 or 1919 and the similarly self-serving statements made in his behalf in the documents described above. All of the documents introduced by Factor were executed after Factor had a reason to deceive others as to his birthplace—namely, his need to protect a fraudulently obtained British passport—

and eight of those documents were executed after plaintiff had a second reason to deceive—namely, his assertion of British citizenship in the *Faber* Case.

27. In contrast, several of the defendants' exhibits were executed prior to 1918—namely, Factor's Illinois Marriage License Application, Factor's Illinois Barber's License Application, Jerome Factor's Birth Certificate, Factor's Declaration of Intention to become a United States citizen, Factor's draft card, and the manifest of the S. S. Haverford —at a time when Factor had no reason to deceive. All of these documents show that Factor's birthplace was stated as Russia or Poland, which was then under Russian domination.

28. Factor readily admitted that he made misstatements of facts in these documents to suit his convenience at the various times that the statements were made. Factor's only explanation for the discrepancies as to his place of birth, which ranged from Lodz, Russian Poland, to Zdunska, Russia, to Hull, England, and to Chicago, Illinois, was that at some time in 1918 or 1919, after taking out his first citizenship papers, his family informed him that he was not born in Russia, but rather that he was born in Hull, England. By way of contrast, Factor's witness Gilbert testified that Factor was present in 1932 when the various affiants described above gave their affidavits and heard Factor say that he had "always known," "always believed," "always thought" or "always heard" that he was born in England (5-27-66 tr. pp. 30, 41, 44-45, 61). Similarly, Factor's witness Lupu testified that Factor was told in Poland prior to 1906 and in St. Louis during the period from 1906 to 1909 that Factor was born in England (Lupu Dep. 47).

29. Factor's sworn application for a second marriage license made on February 6, 1925, stated that he was born

in Chicago, Illinois, in 1892 or 1893. This application was made long after the time when according to Factor's testimony, he knew he was born in Hull, England.

30. Moreover, Factor testified in December, 1964, that the statement made in 1917 on his World War I draft card that he was born in Lodz, Russian Poland, was "correct." (12-14-64 tr. p. 75).

31. On February 2, 1943, Factor was convicted of twenty-three counts of using the United States mails to defraud and one count of conspiracy in the case of *United States* v. *John Factor, alias Jack Factor, alias Jake Factor, alias J. Franklyn,* No. 2076 Criminal, Northern District of Iowa.

32. I can find no basis upon the evidence submitted in this proceeding to change my conclusion announced in the 1959 case that the plaintiff is a "wholly untrustworthy witness." His claim that he was in good faith in 1959 in believing that he was born in Hull, England, has been repeatedly impeached. A portion of this impeachment comes from the evidence supplied by members of plaintiff's own family. On the basis of the complete record, I find that the plaintiff did not honestly believe that he was born in Hull, England, when he asserted this fact in 1959. I further find that the plaintiff was not acting in good faith when he filed the 1959 proceeding and asserted the jurisdictional claim that he was born in Hull, England, and was a citizen of Great Britain.

Conclusions of Law

A. The applicable Statutes of Limitations in this case are Sections 14 and 24(a), Ch. 83, Ill. Rev. Stat., 1965, which provide as follows:

> 14. "Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued."

24(a). "In any of the actions specified in any of the sections of this act or any other act or in any contract where the time of commencement of any action is limited, if judgment shall be given for the plaintiff, and the same be reversed upon appeal; or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff has heretofore been nonsuited or shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

B. Factor's cause of action is barred by Section 14 unless he is able to avail himself of the provisions of Section 24(a), the saving statute.

C. Dismissal for lack of federal jurisdiction qualifies as a "nonsuit" under Section 24(a). *Roth* v. *Northern Assurance Co.*, 32 Ill.2d 40, 203 N.E.2d 415 (1964).

D. The dismissal of the 1959 Case here occurred within one year prior to the commencement of the present suit. Thus, Factor comes within the letter of the saving statute.

E. The statute's letter alone does not control. The Illinois Appellate Court has recently made the following observation in a case under Section 24(a):

> "We believe that plaintiff comes within the letter, but not within the spirit and intent of this section. It is a remedial section which seeks to protect a plaintiff, who brings an action in good faith, from complete loss of relief on the merits because of a procedural defect. It reflects a legislative intent to afford the plaintiff an opportunity to try his case on the merits." *Tidwell* v. *Smith*, 57 Ill. App.2d 271, 273-74, 205 N.E.2d 486 (1965).

It is clear that the court assumes, as a precondition for the invocation of the remedial provisions of Section 24(a) that plaintiff bring the first suit "in good faith." The Seventh Circuit has made the same point:

> "The act is remedial, reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely because of procedural defect." *Sachs* v. *Ohio National Life Insurance Co.*, 131 F.2d 134, 137 (7th Cir. 1942).

Other courts, reading similar statutes, have suggested a "good faith" requirement. See *Smith* v. *McNeal*, 109 U.S. 426, 430 (1883); *Gaines* v. *City of New York*, 215 N.Y. 533, 109 N.E. 594, 596 (1915); *Hardin* v. *Cass County*, 42 Fed. 652 (W.D.Mo. 1890). In *Hardin*, the Court said:

> "It certainly is in the legitimate line of carrying out the spirit of both statutes under consideration to leave where he has voluntarily placed himself the suitor who has sought to misuse and abuse the jurisdiction of this court to obtain its aid in the collection of a claim not cognizable by it. With full knowledge of his rights, the plaintiff saw fit to let the statute of limitations run against his demand while he was juggling with the court and the defendant; and he ought not to expect the same court to invoke the spirit of 'equitable construction' to release him from the trap he sprung on himself." *Id.* at pp. 656-57.

F. I conclude that a "good faith" requirement is implicit in Section 24(a). "Good faith" means that Factor believed on the basis of the facts as he truly knew them that this court had jurisdiction of the 1959 Case and that Factor's defense of the jurisdiction of this court was honestly pursued.

G. After a careful review of the transcripts of the 1959 Case and of my findings of fact and conclusions of law in

that case, and of the evidence submitted on the question of Factor's good faith in this case, there is no doubt in my mind that Factor does not meet the "good faith" standard.

H. Factor was not in good faith in claiming in the 1959 Case that he was born in Hull, England, and he did not act in good faith in pursuing that claim when he knew it to be false.

I. As stated by Mr. Justice Cardozo in *Gaines* v. *City of New York,* 215 N.Y. 533, 109 N.E. 594, 596 (1915), in commenting upon a similar statute:

> "The rule of the statute was enacted to meet the exigencies of the ordinary rather than the exceptional case, to save the rights of the honest rather than the fraudulent suitor."

In my opinion this is such an exceptional case, and the plaintiff should be estopped by his own conduct from claiming any benefit under Section 24(a).

J. Factor's claim in the present case is barred by Section 14, Ch. 84, Ill.Rev.Stat., which is the applicable Statute of Limitations.

Judgment Order

IT IS ORDERED that the motion of certain defendants to dismiss the complaints be, and it hereby is, granted, and that the compaint be, and it hereby is, dismissed as to all defendants with prejudice, and that the plaintiff be, and he hereby is, ordered to pay the costs of the defendants in this suit.

ENTER:

BERNARD M. DECKER
United States District Judge.

DATED: October 20, 1966.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 16000 SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

JOHN FACTOR, *Plaintiff-Appellant,* v. CARSON PIRIE SCOTT & COMPANY, KROCH'S & BRENTANO'S, INC., THE FAIR, Illinois corporations, and RAY BRENNAN, *Defendants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 13, 1968

Before SCHNACKENBERG, *Circuit Judge,* KNOCH, *Senior Circuit Judge,* and SWYGERT, *Circuit Judge.*

SCHNACKENBERG, *Circuit Judge.* John Factor, plaintiff, a resident of California, has appealed from a judgment of the district court dismissing, on the authority of an Illinois statute of limitations,[1] his suit for libel and invasion of privacy, refiled in 1965.

The litigation is a result of the publication and sale of a book entitled "The Stolen Years" which plaintiff's counsel describe as a partially ghost-written autobiography of one Roger Touhy. Plaintiff maintains that the book charges him with perpetrating "one of the biggest swindles

1. § 24a, Ch. 83, Ill. Rev. Stat. 1965.

of its kind in history", and that, in addition, its principal theme is that plaintiff was guilty of perjury and conspiracy to obstruct justice, in connection with the conviction of Touhy for the kidnaping of plaintiff in the 1930's. Defendants moved to dismiss the suit on a number of grounds, including the statute of limitations.

An earlier suit on the same grounds as the instant action had been filed by plaintiff in the court below in December 1959.[2] The named defendants were and are citizens of Illinois although plaintiff alleged he was then a British subject. Touhy was a defendant in the 1959 case until his death. In that case jurisdiction was based on 28 U.S.C.A. §1332 (a) (2), which confers jurisdiction upon district courts in civil actions between citizens of a state and citizens or subjects of a foreign state.

When defendants moved to dismiss the 1959 action for lack of jurisdiction, contending that plaintiff, an alien, was not a citizen of Great Britain, the district court denied the motion. 230 F. Supp. 906 (Dec. 30, 1963). Following a subsequental trial on the issue of jurisdiction, the district court on December 23, 1964 dismissed the 1959 case on the ground that plaintiff failed to sustain his burden of proof of the existence of jurisdictional facts. The court's view of the evidence was that it tended to prove that plaintiff was born in Russian Poland rather than in Great Britain, and that, under the court's interpretation of Russian law, plaintiff was, at the time of filing of that action, a stateless person and so not able to invoke a federal court's jurisdiction under the alienage provision. See 238 F. Supp. 630. The court stated the action was dismissed *with prejudice*.[3]

---

2. *Factor* v. *Pennington Press, Inc., et al.* (59 C 1961).

3. But it is now contended by plaintiff's counsel and not denied that, under rule 41 (b) of the Federal Rules of Civil Procedure, a dismissal solely on jurisdictional grounds could not be an adjudication on the merits.

On September 16, 1965, plaintiff refiled his suit which is the instant action, 65 C 1558. It is undisputed that plaintiff had become an American citizen in 1963 and was a resident of California. His counsel now insist that the jurisdictional defect which caused the dismissal of the 1959 action now constitutes no impediment to the 1965 action and that, in fact, federal jurisdiction exists in this action on the basis of diversity of citizenship.

It is undisputed that the 1959 action had been commenced within the one-year limitation period prescribed by Illinois law for actions to recover damages for libel and for the invasion of a right of privacy. Plaintiff's counsel argue that, when that action was nonsuited, the right to refile was governed by § 24 (a) of the Illinois Limitations Act, which provides:

> § 24 (a) In any of the actions specified in any of the sections of this act or any other act or in any contract where the time of commencement of any action is limited, if judgment shall be given for the plaintiff, and the same be reversed upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff has heretofore been nonsuited or shall be nonsuited then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

Thus plaintiff contends that the one-year limitation period for the libel suit ended during the pendency of the 1959 action, that the dismissal of that action for lack of jurisdiction constituted a "nonsuit" under § 24 (a),[4] and that

4. Plaintiff cites *Roth* v. *Northern Assurance Co. Ltd.*, 32 Ill. 2d 40, 203 N.E. 2d 415 (1964).

the case at bar had been filed within the one-year period after dismissal of the 1959 action. Plaintiff insists he meets every requirement expressed in § 24 (a). However the district court held that plaintiff's action would be barred by the limitations unless he could show that he had acted in good faith in the 1959 action, which meant, according to that court, that plaintiff must have believed, *in good faith,* that he was born in Great Britain, when he prosecuted that action.

The court then determined the "good faith" issue against plaintiff, on the basis of the trial on the issue of jurisdiction of the 1959 action, and dismissed the 1965 action. However, on plaintiff's motion to vacate that dismissal, the court consented to receive evidence and on May 27, 1966 did hold a hearing, but, over plaintiff's objection, imposed upon *him* the burden of *disproving defendants' charges of bad faith* in connection with the 1959 action. The court received the oral testimony of witnesses in court, as well as certain depositions and a number of exhibits produced by plaintiff, all of which we condense as follows:

> Plaintiff's sister, Dena Lupu, a housewife, aged 76 years, living in Los Angeles, California, by deposition, testified her mother's name was Leah Factor and her father's name was Abraham Joseph Factor, both deceased; that she was born in Lodz, Russia-Poland, that she and plaintiff, her brother, came from there to the United States with their parents; that plaintiff when he came to the United States, spoke Jewish; that he was about two years younger than she; that at their home her parents told her that her brother John was born in England; that they never told her John was born any other place than England.
>
> Ted Factor, plaintiff's nephew, testified by deposition that in 1924 or 1925 in his parent's home in Chicago, when he was about nine or ten years old, his father who was about to go on a visit to Europe told

him he was going to visit a brother in Hull, England, and that Ted's father stated Hull was the birthplace of John Factor, plaintiff here.

Ted Factor also recalled that other members of the family gave him the same information on other occasions, but that neither his father nor his uncle (plaintiff here) had ever told him the latter was born any place other than Hull, England.

Monte Factor, by deposition, testified that he is a nephew of plaintiff and also a son of Nathan Factor; that, in his parents' home in St. Louis, prior to 1924 and in Chicago, and Oakland and Los Angeles, California, in 1924 and 1925, he heard both of his parents state that his uncle, John Factor, was born in England. He never heard his parents say that John was born at any other place.

Jerome Factor testified that he is plaintiff's son, that his parents were divorced about 1917, and that he has had frequent contacts over the years with plaintiff; that between 1930 and 1933 he and plaintiff were looking through a box and came upon plaintiff's British passport, whereupon plaintiff said that he was a British subject and was born in Hull, England. Further, Jerome testified that about 1924 he had a conversation with his uncle, Nathan Factor, in his St. Louis home in the presence of the latter's wife, Rose, and their sons, Ted and Monte, when Nathan Factor stated that plaintiff had been born in Hull, England, and he was the only member of the Factor family born any place other than Russia-Poland; that plaintiff's father and mother had been in Hull at the time of plaintiff's birth and that after plaintiff's birth plaintiff had been taken back to Poland.

Jerome also recalled that about 1926 he talked with plaintiff's sister, "Aunt Gussie", at her store on Roosevelt Road in Chicago, when she stated that plaintiff was born in England.

Retired Chicago attorney George Gale Gilbert, Jr.,

testified he met plaintiff in 1928 when he came to Gilbert for the purpose of making a will. Under Gilbert's questions, indicating the importance of the information he sought, plaintiff informed him that he was a British subject and that he was born in Hull, England. He produced a British passport which indicated that he had obtained it by representing that he was born in Hull, England.

Mr. Gilbert testified that he represented plaintiff in the federal district court in Chicago in the case of *Faber, et al.*, v. *Foreman Trust and Savings Bank*, No. 10538, in the course of which he made an investigation concerning plaintiff's place of birth. This investigation included a discussion with plaintiff, three of his brothers, an examination of immigration records, and a further interview with a brother and with plaintiff. Gilbert named several of these relatives. Also in 1932 he interviewed plaintiff's brother, Max Factor, who was deceased at the time Mr. Gilbert testified, and from Max he got the family history including the fact that plaintiff was born in Hull, England, of a rabbi father and his wife, while sojourning there, the details of which were set forth in Max's affidavit, hereinafter described.

John Factor, who was present at this interview, told Gilbert that he always believed that he had been born in Hull, England, that it was the family tradition in relation to his birth that he had heard several times. Rella Factor, wife of plaintiff, was in the room during the conversation.

Mr. Gilbert further testified that he recognized the signature "Max Factor" on the affidavit dated February 26, 1932, marked plaintiff's exhibit 1 and that it was so signed in his presence and that he (the witness) notarized it and also was familiar with its contents.

Mr. Gilbert also testified that he prepared an affidavit (plaintiff's exhibit 2), dated March 8, 1932 which was executed by Max Factor following an interview with him in Gilbert's office. Gilbert had interviewed

Max Factor in the presence of John Factor and a secretary, during which the place of birth of plaintiff was discussed.

Gilbert further testified that Max told him again in greater detail of the family history of the birth of John in Hull, England, that he made a memorandum thereof, and that the affidavit contains the substance of what Max told him.

The witness [Gilbert] added that plaintiff looked over the affidavit and said something like "that is what I always thought".

So during 1932 the persons interviewed included John Factor, Max Factor, Daniel Factor and Nathan Factor. On these occasions both Nathan and Daniel also executed sworn affidavits. These affiants in detail stated that their father and mother, in 1892, left the home in Lodz, Poland, for a trip through Europe, in the latter part of that year returning to Lodz with a newborn child called John Factor, who was born in Hull, England. Neither Daniel nor Nathan was alive at the time Gilbert testified.

Plaintiff's testimony at the hearings in the 1959 and 1965 actions included the following:

He is the son of Abraham Joseph Factor, a rabbi, and Leah Factor, and spent his childhood in or near Lodz, Russian Poland; that he, his parents and sister Dena emigrated to the United States in 1905 or 1906. Until 1918 or 1919 he had assumed, without being told, that like his brothers and sisters, he had been born in or around Lodz.

In 1917 he made application to become a naturalized citizen of the United States, stating in the application that he was born in Russia; that shortly thereafter he informed his parents about the naturalization application and the statement therein regarding his place of birth; that then for the first time his parents informed him that the information he used on the appli-

cation was incorrect, that he had been born in Hull, England, while the parents were on a visit there. As a result, plaintiff stated he took no further action with respect to his application for citizenship; that since this conversation he has continuously believed in good faith that he was a citizen of Great Britain by reason of birth there; that this belief was based, not only upon the aforementioned conversation with his parents, but upon later conversations with his parents, older half-brothers Max and Daniel, and his elder brother Nathan; that in all conversations with his father and mother they always stated that he was born in Hull, England. That all of his immediate family, except his brother Frank Factor, and his sister Dena Lupu, were deceased at the times of the hearings; that Frank, about five years older than he, was very ill.

That in the 1920's he made an investigation concerning his birthplace, asking a brother Bernard, living in Hull, England, to attempt to find proof of where plaintiff was born, and that in 1928 Bernard sent him a letter to the effect that "Enclosed you will find this document which I received from Mr. Schultz. He was at your circumcision."; that the enclosure [plaintiff's exhibit 9] is an affidavit of Solomon Schultz, dated March 23, 1928, at Kingston-upon-Hull, England.

Plaintiff testified that the customs of the orthodox Jewish faith require that infant boys be circumcised seven days after birth.[5]

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5. Affiant Schultz states in said affidavit that he at the time of said affidavit, was a tailor, 65 years of age, that Kingston-upon-Hull, England had been his residence for 64 years; that he remembered being present at a circumcision by Mr. Pearlson, a Jewish clergyman, performed in that city in a house in Upper Union Street, upon a child Jacob Factor, whose father was a traveling preacher Abraham Joseph Factor; that he remembered the incident definitely as the father had given an address the previous Saturday in the synagogue at Robinson Row, in Kingston-upon-Hull, that the date of this circumcision was about 1892.

Plaintiff testified further that:

> During the course of his investigation in the 1920's regarding circumstances surrounding his birth, he obtained an affidavit [plaintiff's exhibit 10][6] from his mother, which has since been in his possession for many years.

Plaintiff identified his passport issued in Canada in 1923 [plaintiff's exhibit 14] which describes him as a British subject and states he was born in Hull, England. He also testified that when he filed, on October 21, 1959, his petition for naturalization as an American citizen, he stated therein that he was born in Hull, England. Records of the United States District Court for the Southern District of California in case No. 217,599, corroborate plaintiff in that respect.

Defendants rested solely upon the transcript and exhibits introduced at the trial of the jurisdictional issue in the 1959 action.

Defendants, in their brief, cite plaintiff's testimony in the 1959 case that in an affidavit he had stated his parents sojourned in England for two or three months and that his birth occurred on October 8, 1892 in Hull, England. Defendants also introduced in evidence the manifest sheet of the S.S. Haverford landing at Philadelphia, Pennsylvania in March, 1906, on which plaintiff, his parents and sister came to this country, showing plaintiff's age as "eleven" and his nationality as Russian. That manifest sheet listed thirty names, with twenty-two printed

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6. Affidavit bears date of August 2, 1924, stating affiant's son, John Factor, was born at Hull, England, is executed by Leah Factor by her mark, notarized by Rose Factor. Monte Factor, Rose Factor's son, testified that the signature is that of his deceased mother.

column headings, on the first line of which opposite the first name in the column headed "Nationality" appeared the word "Russia". In that column underneath on each line of the sheet appeared a checkmark opposite each of twenty-nine names indicating each was from "Russia".

The record shows that plaintiff explained the discrepancy in his testimony about his age by admitting he "could not remember things that occurred that long ago" and that "these are discrepancies that are through the history of our family, because we had no birth certificates." Defense counsel attempted to impeach plaintiff as a witness by also calling his attention to statements about the date and place of his birth in connection with his application for a barber's license, his declaration of intent to become a naturalized citizen of the United States, the procuring of a Selective Service registration card in 1917, a birth certificate for his son Alvin, and his statement in 1925, when applying for a marriage license for his second marriage, that he was born in Chicago. In explanation, plaintiff testified frankly that he was in England when the son Alvin was born and did *not* furnish the information contained in the son's birth certificate; likewise that he listed Chicago as his birthplace because he feared that the revelation of his alien status might hinder or delay his marriage.

Defendants introduced their exhibit 14, an opinion by District Judge Woodward of the United States District Court in Chicago, dated March 5, 1932, in the case of *Faber* v. *Foreman Trust & Savings Bank,* No. 10538 in said court, denying a motion of John Factor and Rella Cohen Factor to reconsider their prior motion to dismiss the amended complaint in that action on jurisdictional grounds, which had been denied by Judge Wilkerson. Defendants' exhibit 15 is a verified motion by defendant

Arthur L. Schwartz to dismiss the said amended complaint for want of jurisdiction, while defendants' exhibits 9 and 10 are copies of the decree and of findings of fact and conclusions of law entered in the *Faber* case September 29, 1932. There is a recital in defendants' exhibit 10 that John Factor is a citizen and resident of Illinois. Finally, defendants introduced documents showing the indictment, conviction and sentence in 1942-1943 of plaintiff for mail fraud.

Thereupon the trial court in the 1965 case on October 20, 1966 entered findings and concluded that the plaintiff had not shown good faith in claiming in the 1959 case that he was born in Hull, England, and held that his claims were barred by limitations. It dismissed the complaint with prejudice. Although estoppel had not been pleaded, the court said that plaintiff "should be estopped" from relying on § 24 (a).

1. The question of whether plaintiff was entitled to take advantage of the right, bestowed by § 24 (a), to refile his action, and, if so, under what conditions, was settled by the Illinois legislature when it enacted § 24 (a). The language of the act is precise. It is complete. These facts require the rejection of any additional requirement which a court might seek to impose. It was the duty of the district court to apply § 24 (a) as enacted.

In *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 48 (1964), the court said:

> "• • • *The plain purpose of section 24* is to facilitate the disposition of litigation upon the merits and *to avoid its frustration upon grounds that are unrelated to the merits.* No reason is suggested why this purpose is not just as applicable to a short contractual limitation as it is to the longer statutory period. In neither case is any injury inflicted upon

> the defendant, who must have knowledge of the claim asserted against it within the time provided by statute or contract, before the provision for the new action becomes operative. * * *" (Emphasis supplied.)

and at 49, the court added:

> "* * * 'Statutes of limitation, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant a fair opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible. That purpose has been fully served here. As observed by Mr. Justice Holmes in *New York Central Railroad* v. *Kinney*, 260 U.S. 340, 342, "Of course an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of opinion that a liberal rule should be applied."' *Geneva Construction Co.* v. *Martin Transfer and Storage Co.*, 4 Ill. 2d 273, 289-90."

In *White* v. *Turner-Hudnut Co.*, 322 Ill. 133, 140 (1926), the court said:

> "* * * Statutes of limitation are restrictive and will not be extended to cases other than those for which express provision is made. * * *"

The words of the statute of Illinois are unambiguous. However, in the case at bar, the district court in effect wrote into § 24 (a) a limitation which the general assembly did not insert nor the Illinois Supreme Court has ever applied. The district court would withhold the benefit of the statute until plaintiff proved his good faith with respect to the allegations in the complaint which he had filed in the nonsuited action. We have been cited to no decision of any federal court or of any Illinois court

which has superimposed this burden upon one who seeks to take advantage of § 24 (a). This is not surprising, because the right to plead the defense of limitation of an action has always been recognized by courts of law. Usually it is embodied in statutes, in which case the success of such defense depends upon the provisions of the statute itself, not to a judicial modification thereof. Section 24 (a) is an additional statutory device, the use of which merely postpones the effectiveness of the intervening bar of a statute of limitations where a suit, filed seasonably, has been nonsuited. Where § 24 (a) operates, it effects an extension of the time allowed for suing on the original cause of action. Therefore the new suit so filed is subject to defenses on the merits in the same way as was the first suit filed. We find no basis in law for holding that a plaintiff's reliance upon § 24 (a) *ipso facto* creates an issue of his good faith in doing so. We shrink from the proposition that conformity to a state statute creates a presumption of bad faith.

There is no contention here, nor was there in the court below, that the equitable doctrine of laches bars plaintiff's action.

In *Lamson* v. *Hutchings,* 118 Fed. 321 (1902),[7] we discussed 2 Starr & Curtiss Ann. St., p. 2642, c. 83, par. 25, which was the forerunner of the present § 24 (a). In an earlier appeal[8] this court had ruled that the case there involved was governed by the Illinois five-year statute of limitations. That suit was dismissed on February 4, 1897 and a new suit was commenced within one year thereafter. Par. 25 provided:

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7. Cert. denied 189 U.S. 514 (1903).
8. *Hutchings* v. *Lamson,* 96 Fed. 720 (1899).

> "In any of the actions specified in any of the sections of said act, * * * if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, * * * may commence a new action within one year after such judgment * * * given against the plaintiff, and not after."

At 323, this court said:

> "* * * By that same token we think that this statute of Illinois, which seeks to relieve the diligent but mistaken claimant from the consequences of his mistake, should receive a like liberal interpretation in the interests of justice and of fair play. * * *"

At 324, we continued:

> "* * * The intent of the statute was that the time occupied in an unsuccessful litigation touching a demand—the statutory limitation expiring during the litigation—should not prove a bar, where the merits of the controversy had not been determined, but that a period of one year should be allowed after the expiration of the unsuccessful litigation to bring a proper action to enforce the demand; and this whether the unsuccessful litigation be at law or in equity. The legislature was not dealing with form merely, but with substance, to relieve from mistaken proceedings. * * *"

Accordingly this court affirmed the judgment against defendants entered by the district court.

It is significant that in the *Lamson* case, neither court nor counsel deemed worthy of mention the "good faith" of either litigant which, if it were relevant, could be injected to harass plaintiff in every case involving § 24 (a). We still believe that our views in *Lamson* are sound and that there can be no justification for the action of the district court in virtually amending § 24 (a) by adding the

words "good faith" and thus legislating a broad exception to § 24 (a). We think it significant that, likewise in *Roth, ante,* page 10, there is an absence of any inquiry into or judicial interest in plaintiff's good faith with respect to the filing of the prior action.

But on this point, defendants herein rely on *Tidwell* v. *Smith,* 57 Ill. App. 2d 271, 273-274; 205 N.E. 2d 484, 486 (2d Dist., 1965). However, in *Tidwell* the plaintiff attempted to use § 24 (a) after his self-initiated delay, which the court held constituted a virtual abandonment of his cause of action, rather than for the purpose of affording a fair opportunity to try the case on the merits, which is unlike the situation in the case at bar.

In *Sachs* v. *Ohio Nat. Life Ins. Co.,* 7 Cir., 131 F.2d 134 (1942), we emphasized the liberal construction to be given to § 24 (a). The opinion of this court shows that it was concerned with the question of whether the word "nonsuit" included "dismissal for want of jurisdiction of the amended and supplemental complaint filed in the former suit" and so was a "nonsuit" within the meaning of § 24 (a). No issue of good faith was before the court. Although, at 137, we said,

> "The act is remedial, reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely because of a procedural defect. * * * ",

obviously the words "good faith" are *obiter dictum.*

2. The fundamental question now is whether there was in the evidence in the record before the district court a sufficient basis for a reasonable belief by plaintiff that he was born in Hull, England.

In brief, the Factor family in 1892 was living in Russia, but plaintiff's birth occurred while his rabbi father and

mother were then on a temporary sojourn in England. Defendants seek to raise a doubt by pointing to a routine entry made by a crewman on an Atlantic Ocean vessel's manifest in 1906 which would indicate, plaintiff's age as 14 years when considered with his claimed birth date of 1892, rather than the 11 years shown thereon, and that the manifest listed plaintiff, his father, mother and a sister as "Russians".

On the other hand, plaintiff's exhibit 9 is an affidavit by Solomon Schultz, which he executed on March 23, 1928 before a commissioner in the Supreme Court of Judicature in England. Therein Schultz swore that he had been a resident of Hull, England, "for the past 64 years" and that he was present about 1892 when a Jewish clergyman named E. Pearlson at a house (the location of which he stated) in Hull, England, performed a circumcision on a child named Jacob Factor,[9] whose father was a traveling preacher named Abraham Joseph Factor; that he was able to speak "so definitely" because "of the unfamiliar name and the father of the child being a preacher who gave an address the previous Saturday in the synagogue in Kingston-upon-Hull aforesaid".

In 1892 Rabbi Factor took his pregnant wife to England. In the city of Hull he participated in the religious service at the Jewish synagogue. In that city the child of this pregnancy, named Jacob, was born to the Factors and was circumcised a few days later, according to the ritual of the Jewish faith. Thus started the life of plaintiff.

General conditions in Europe, both before and after that time, contributed to heavy immigration of Jewish

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9. Jacob and John are used interchangeably for plaintiff in the record in this case.

people from Europe to the United States. In the decade of 1871-1880, 73.6 % of immigrants to the United States came from northern and western Europe, and *only* 7.2% from southern and *eastern* Europe, and the figures for the decade 1891-1900 show that the immigrants to the United States from northern and western Europe were 44.6% and those from southern and *eastern* Europe were 51.9%. But, in the following decade, 1901-1910, immigrants to the United States from northern and western Europe comprised only 21.7% while those originating in southern and *eastern* Europe were *70.8%*. 8 U.S.C.A. 1, 12 (1953).

Thus, when plaintiff with his parents and sister Dena arrived at Philadelphia in 1906, the so-called "new immigration", largely coming from Russia as a result of Czarist persecution of the Jews, was at its height.

While it might have appeared superficially that plaintiff and his family were traveling by ship to the United States as part of a great migrating wave composed of *Russian* citizens, the undisputed fact that he was born in England had made him a British national.

In determining his status, the law in the United States recognizes the principle that a person's citizenship may be based upon his place of birth. Thus, plaintiff's naturalization in the United States by an order of the United States District Court for the Southern District of California, entered July 15, 1963, recognized that he had been a national of England by virtue of his birth at Hull, England, on October 8, 1892.

3. Defendants' counsel offered in evidence exhibits 14 and 15, which are an opinion by Judge Charles E. Woodward of the United States District Court at Chicago, Illinois, and the verified motion of a defendant, Arthur L. Schwartz, to dismiss the second amended complaint in

the *Faber* case, *ante,* page 5. However, we note that here (1) all of the testimony of various witnesses for plaintiff Factor (either personally, by deposition or by affidavit) was before the district court from which the present appeal has been taken, and (2) this court's determination of this appeal is based upon all of said evidence, but (3) only parts of that evidence were before Judge Wilkerson and Judge Woodward.

4. Although the district court, from which the appeal in the present case was taken, imputed bad faith to the plaintiff in his assertion of his birth in England, the cumulation of facts established by the evidence, as hereinbefore set forth in this opinion, pointing to the birth of plaintiff at Hull, England, the evidence of family repute by the testimony of attorney Gilbert, and depositions and affidavits of numerous relatives of plaintiff, all lead to an inescapable conclusion that plaintiff could have justifiably believed that he was born in England in 1892. The correctness of this factual result is emphasized by the statement which plaintiff made to his attorney in 1928 when plaintiff consulted him for the purpose of making a will. On such an occasion a man would ordinarily have no conceivable purpose for concealing the place of his birth. Plaintiff then showed him a British passport, which he had just obtained and which showed that he had been born in Hull, England. Also in evidence as plaintiff's exhibit 14 is a Canadian passport issued January 2, 1923 to plaintiff, therein described as a "British subject."

Actually we must realistically face a situation where, in order to sustain the district court's findings herein, it would be necessary for us, not merely to disregard the mass of evidence in this record tending to support plain-

tiff's contention, but also to implicitly conclude that the witnesses and affiants, by which such evidence has been established, are unworthy of belief, either because of perjury or an amazing incapacity to remember important matters of family pedigree.

As to plaintiff being estopped in this case, it should be noted that rule 8 of the Federal Rules of Civil Procedure provides that the defense of estoppel must be set up in a pleading. There is no such pleading on file in this case.

For these reasons the judgment of the district court is reversed and this cause is remanded to that court for a trial on the merits in accordance with the views herein expressed.

REVERSED and REMANDED
WITH DIRECTIONS.

KNOCH, *Senior Circuit Judge.* (dissenting) It seems to me that the statute in question is designed to benefit those who make honest mistakes of law or fact and that the District Court did not err in considering the element of good faith. Nor does it seem to me that the burden of proving good faith was imposed on the plaintiff but merely the burden of carrying on with evidence at the hearing after a prima facie allegation of facts to show lack of good faith. While there is a conflict in the evidence, I do not believe that we can conclude that the District Court was clearly erroneous in its findings of fact. I would affirm the order of dismissal.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JOHN FACTOR, Plaintiff, -vs- PENNINGTON PRESS, INC., an Ohio corporation, et al., Defendants.	No. 59 C 1961

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ORDER

This cause having come on for hearing on the defendants' motion to dismiss for want of jurisdiction over the subject matter of this case, on the ground that there is no diversity of citizenship between the plaintiff and the defendants, as required by 28 U.S.C. § 1332, and the Court, having considered the complaint, the motion to dismiss, affidavits submitted by the parties, briefs on the law and having heard evidence produced in open court by both parties and allowed oral argument by both parties, being fully informed in the premises, now finds as follows:

Findings of Fact

1. The issue in this case is whether John Factor, the plaintiff, was, as he alleges in the complaint, a citizen of the United Kingdom and a resident of the State of California as of the date of filing the complaint. The plaintiff claims to be a citizen of the United Kingdom, and the

Court finds that the defendants are all individual citizens of Illinois or corporations of Illinois or corporations with their principal places of business, or doing business, in Illinois.

2. Testimony was received in open court on this jurisdictional issue by the Court, sitting without a jury.

3. The plaintiff's sole claim, and the evidence he introduced in support of the claim, is that he was a citizen of the United Kingdom by virtue of the fact that he was born in Hull, England. The plaintiff never was naturalized a citizen of England or the United Kingdom or of any other country than the United States. (His naturalization in the United States occurred July 15, 1963, which was subsequent to the date of filing of the complaint herein.) The plaintiff's only claim to citizenship in the United Kingdom is that he was born in the United Kingdom.

4. The plaintiff introduced in evidence the following documentary evidence to sustain his claim that he was born in Hull, England:

A photostatic copy of a British passport which the plaintiff obtained in Canada in 1920;

An affidavit of one Solomon Schultz, allegedly made in 1926, in Britain, stating that Solomon Schultz knew of the plaintiff's birth in Hull, England;

An affidavit of the plaintiff's mother, Leah Factor, certified to by one Rose Factor in 1928, also stating that the plaintiff was born in Hull, England;

A non-contemporaneous certificate of the birth of one Jerome Factor, the plaintiff's oldest son, which is dated November 27, 1942, and purports to certify to the birth of Jerome Factor on November 16, 1913; which later certifi-

cate of birth states that the father's place of birth was Hull, England.

The plaintiff also offered in evidence certified copies of a petition for naturalization and of findings of fact and conclusions of law and recommendations of a naturalization examiner which became orders of the United States District Court of the Southern District of California when they were entered in 1963. These documents contain statements by the plaintiff that he was born in Hull, England, but they were not received in evidence.

5. The plaintiff testified that he was born in Hull, England, on October 8, 1892, and first entered the United States in 1905 or 1906 at the Port of Philadelphia. His last entry into the United States for naturalization purposes was at El Paso, Texas, December 3, 1930. The plaintiff further testified that his first application for first citizenship papers was made in 1917, and in this the plaintiff admitted he stated that he was born in Russia. Subsequently, the plaintiff testified he learned from his parents and brothers that he had been born in Hull, England, and he did not pursue his first application for naturalization because, he testified, he learned that he had misstated the place of his birth. On testimony as an adverse witness called by the defendants in this case, the plaintiff testified that he has been known by other names and that he has signed these names to the various official documents mentioned below. These names, in addition to John Factor, are: J. Factor, Jake Factor, Jacob John Factor, Yanko Factor, Jack Factor and John Jacob Factor. The plaintiff testified that he was one of nine or ten children born of his father's second marriage to his mother, Leah Factor. Plaintiff admitted that all eight of his full brothers and sisters were born in Russia, most of them being born in Lodz. The plaintiff testified that his father was an itinerant rabbi, who spent

six or eight months in England where the plaintiff claims that he was born. The plaintiff admitted that in a prior sworn deposition he had stated that his father's sojourn in England was only for two or three months.

6. The plaintiff admitted making an application for a marriage license to one Bessie Schatz on August 7, 1911. He admitted signing the application in the name of Jack Factor. This application, made under oath, stated his birth date as 1889 or 1890 and did not state the place of his birth. The plaintiff admitted making an application for a barber's license in the State of Illinois in 1912, which he signed as Jack Factor and in which he stated, under oath, that his birth date was 1889 or 1890 in Russia. Factor stated, "I merely took it for granted where I was born," at the time he filed and signed this application.

7. The plaintiff stated that he had never signed nor had ever given anyone the information necessary to fill out a certificate of his son Jerome's birth in the State of Illinois. This certificate, which was admitted in evidence, bore the signature "Jack Factor," stated his birth date was 1891 or 1892 and his birth place Russia, but it was not made under oath. The certificate is dated November 16, 1913, and the plaintiff admitted that at that time he was under the impression that he was born in Russia and probably told that to his wife, Bessie Schatz.

8. The plaintiff admitted signing a declaration of intention to become a United States citizen under oath on February 27, 1917. The plaintiff signed this declaration in the name of Jacob Factor and stated that his birth date was December 15, 1892, in Zdunska, Russia. In this declaration, which was sworn to before the Clerk of the United States District Court for the Northern District of Illinois,

he stated it was his intention to renounce allegiance to the Czar of Russia of whom he was then a subject.

9. The plaintiff admitted signing in the name of J. Factor a draft card for the United States Selective Service System during the First World War, under oath, on June 5, 1917. On this draft card, he stated his birth date was October 8, 1890, in Lodz, Russian Poland.

10. The plaintiff admitted signing under oath an application for a second marriage license in the State of New York in the name of Jacob Factor on February 6, 1925. In this application he stated that he was born in 1892 or 1893 in Chicago, Illinois. When he was asked what he hoped to accomplish by stating that he was born in Chicago, Illinois, in this application, he stated, "Well, I was here on a visa, a short time visa, and I was hoping to get married immediately, and I was afraid that if I put down that I was born in England, I might have to wait a week or two weeks, or longer, I did not know."

11. A birth certificate of Alvin J. Factor, the youngest son of the plaintiff, was also received in evidence, signed by the Registrar of Chicago Lying-In Hospital, dated December 25, 1925. The plaintiff stated he was in London, England, at the time of this son's birth, and that he furnished no information on that certificate. The certificate stated that the father was Jack Factor and that he was born in 1892 in Chicago, Illinois.

12. A manifest of the ship S.S. Haverford was admitted in evidence. This manifest showed that the ship sailed from Liverpool, England, on March 7, 1906, and arrived at Philadelphia, Pennsylvania, on March 19, 22 or 26, 1906. The manifest states that Abraham J. Factor(the plaintiff's father), Leah Factor (the plaintiff's mother), Denah Factor

(the plaintiff's sister), and Jacob Factor (the plaintiff) were on board as aliens. Although the plaintiff did not sign this manifest, and he stated that neither he nor his parents nor his sister could speak English at this time, when the plaintiff was asked by the Court how old he was in 1906 when he arrived in the Port of Philadelphia, he stated "about eleven, I believe." When the discrepancy between this statement and his claim that he was born in 1892 was pointed out to him, the plaintiff stated that he just could not remember things that occurred that long ago.

13. The only evidence supporting the plaintiff's claim that he was born in Hull, England, and therefore was a citizen of the United Kingdom at the time he filed his complaint, are his own self-serving statements made in the documents described above. The plaintiff admitted readily that he made misstatements of facts in these documents to suit his convenience at the various times that the statements were made. His only explanation for the discrepancies as to his place of birth, which ranged from Lodz, Russia-Poland, to Zdunska, Russia, Hull, England, and Chicago, Illinois, was that at some time in 1918 or 1919, after taking out his first citizenship papers, his family informed him that he was not born in Russia, but rather that he was born in Hull, England.

14. Plaintiff testified that he wrote his brother, who also lived in Hull, England, in 1919, and that his brother sent him the affidavit of Solomon Schultz, referred to above. The plaintiff stated that after 1918 or 1919, he knew he was born in Hull, England, and so claimed whenever he was asked.

15. The plaintiff testified that the first time he ever stated to anyone that he was born in Hull, England, was about 1918 or 1919, but he never made that statement in

writing or made a statement of record until he obtained a British passport in Canada in 1920.

It should be pointed out, parenthetically, that the plaintiff was not a citizen of Russia at the time of filing this complaint, because the Court finds that the law of Russia required that all persons who were subjects of Russia by virtue of being born of a Russian father under the reign of the Czar, and who left Russia prior to the 1917 Revolution, had to notify the Russian government of their intent to become citizens of the U.S.S.R. within certain stipulated periods of time. In Factor's case, since he was residing in the United States, it would have been necessary for him to have so notified the Russian government in 1933, after the United States and Russia established diplomatic relations. The evidence is clear that the plaintiff never took these steps.

16. The application for a second marriage license made on February 6, 1925, sworn to by the plaintiff, stated that he was born in Chicago, Illinois, in 1892 or 1893. This application was made long after the plaintiff testified that he knew he was born in Hull, England.

17. Since the plaintiff testified that it was difficult to remember events that occurred many years ago, and since he placed his reliance on statements his family made to him as to the place of his birth, plaintiff was questioned as to the order of birth of his brothers and sisters. The plaintiff testified that he was the youngest child in the family. He testified that the next oldest was Denah; he did not know when she was born, but he believed that she is either two or three years older than himself. Plaintiff also testified that he has one other brother, Frank, still living; he was unable to say when Frank was born, but thought he was perhaps four or five years older than the plaintiff.

18. I find that the plaintiff Factor was a wholly untrustworthy witness and that the frequent and repeated impeachment of his claim that he was born in Hull, England, makes it impossible to believe either his claim in Court that he was born in Hull, England, on October 8, 1892, or his statements made in the various documents summarized above to the same effect.

19. The plaintiff has failed to sustain his burden of proving that he was a citizen of the United Kingdom at the time of filing his complaint.

Conclusions of Law

1. The Court has jurisdiction over the parties to this action.

2. The plaintiff has failed to sustain his burden of proving that the Court has jurisdiction over the subject matter of this case in that plaintiff has failed to prove that diversity of citizenship exists between the plaintiff and the defendants.

3. The plaintiff has failed to prove that at the time of filing the complaint, he was a citizen of the United Kingdom, and therefore, the diversity jurisdiction of this Court does not attach to this case.

4. The plaintiff was at the time of filing the complaint a stateless person, and a stateless person is not a citizen of a state of the United States or of any foreign state for purposes of satisfying the diversity of citizenship requirements.

Judgment Order

IT IS ORDERED and ADJUDGED, on the basis of the foregoing Findings of Fact and Conclusions of Law, that the motion of the defendants to dismiss the complaint is

hereby granted, and the complaint is hereby dismissed with prejudice, and the plaintiff is ordered to pay the costs of the defendants in this suit.

ENTER:

BERNARD M. DECKER
United States District Judge.

Dec. 23, 1964

APPENDIX D

Section 14 of Chapter 83, Revised Statutes of Illinois, 1965:

"Actions for slander, libel or for publication of matter violating the right of privacy, shall be commenced within one year next after the cause of action accrued."

Section 24a of Chapter 83, Revised Statutes of Illinois, 1965:

"In any of the actions specified in any of the sections of this act or any other act or in any contract where the time of commencement of any action is limited, if judgment shall be given for the plaintiff, and the same be reversed upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff has heretofore been nonsuited or shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

Rule 52(a) of the Federal Rules of Civil Procedure:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erro-

neous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

APPENDIX E

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT, FIRST DIVISION
OCTOBER TERM, A.D. 1960

MILTON A. LUNDSTROM, Plaintiff-Appellant, vs. WINNEBAGO NEWSPAPERS, INC., a Delaware corporation, Defendant-Appellee.	Appeal from the Circuit Court, Winnebago County.

McNEAL, J.—

The Circuit Court of Winnebago County sustained a motion to strike and dismiss Milton A. Lundstrom's complaint for libel and entered final judgment in favor of the defendant, Winnebago Newspapers, Inc., a Delaware corporation. Plaintiff appealed.

Plaintiff filed his complaint on April 16, 1959, and alleged that defendant published articles libeling him in the Rockford Morning Star on January 23 and 25, 1958. Section 13 of the Limitations Act (Par. 14, Ch. 83, Ill. Rev. Stat. 1957) requires that actions for libel be commenced within one year next after the cause of action accrued. Plaintiff's action was clearly barred by section 13, unless the limitation was extended by section 24 of the Act (Par. 24a, Ch. 83, Ill. Rev. Stat. 1957). Plaintiff alleged section 24 in his complaint, as follows:

> "In any of the actions specified in any of the sections of this act, if judgment shall be given for the plaintiff, and the same be reversed by writ of error, or upon

> appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or, if the plaintiff be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after."

To comply with section 24 plaintiff also alleged that on January 21, 1959, he filed a cause of action in the District Court of the United States for the Northern District of Illinois, Western Division, entitled Milton A. Lundstrom vs. Winnebago Newspapers, Inc., a Delaware corporation; and that his complaint in the Federal court "contained in count I the same cause of action which is alleged in count I of this complaint and contained in count II the same cause of action which is alleged in count II of this complaint." It was alleged that the jurisdiction of the Federal court was based upon diversity of citizenship between the plaintiff and the defendant corporation; that although that court denied defendant's motion to strike based on the ground that the publications were not libelous per se, the court on its own motion dismissed the complaint because defendant has its principal place of business in Illinois and there is no diversity of citizenship.

On this appeal defendant contends that the trial court properly sustained its motion to dismiss the complaint because the cause of action attempted to be alleged is barred by the statute of limitations and because the provision permitting parties to file new actions within one year is not applicable to the instant case. In the trial court defendant moved to strike and dismiss the complaint for the reasons that the alleged causes did not accrue within the time limited by section 13 of the statute of limitations; that plaintiff

does not bring himself within the purview of section 24 of the statute "for the reasons that: a. Judgment has not heretofore been given for the plaintiff and reversed; b. Judgment has not heretofore been given againt the plaintiff; c. Plaintiff in prior action filed has not been non-suited. It further appears * * * that plaintiff has not met nor conformed with the conditions provided in Chapter 83, Illinois Revised Statutes, Section 24 (a) so as to permit the filing of an alleged new action"; and that there was another suit pending between the same parties alleging the same cause of action.

An affidavit in support of defendant's motion shows that the other suit pending was the action which this court reviewed in 27 Ill. App. 2d 128. Our opinion in that case sets forth the alleged libelous articles published on January 23, and 25, 1958, and also another article published on February 5, 1958. Since the complaint in that suit was filed on February 4, 1959, the articles published in January, 1958, were barred by the one year statute of limitations, and were not reviewed in 27 Ill. App. 2d 128. In our decision in that case only the article published on February 5, 1958 was reviewed and held not to be libelous per se.

In his memorandum decision the trial judge concluded that section 24 applies to procedures in the State court and provides for an extended period of limitation in the State court when proceedings in the State court would deprive the plaintiff of his cause of action by limitation, and therefore struck the complaint and rendered judgment for defendant.

Defendant makes no point and presents no authority for the proposition that section 24 applies only to procedures in the State court or that it does not protect a party who erroneously sued in the Federal court instead of the State court. Defendant's principal contention here is that section

24 is applicable only to cases where the records of the two suits are such that the court can determine from an inspection of the records that the causes of action are the same. In support of this contention defendant's counsel cites Gibbs v. Crane Elevator Co., 180 Ill. 191 (1899). In that case plaintiff filed a praecipe, summons was served, and thereafter plaintiff was non-suited because he failed to file a declaration by the second term of court. To the declaration in the second suit defendant pleaded the statute of limitations, and plaintiff filed a replication setting up the commencement of his former suit. Thus, where there was no means of ascertaining what plaintiff intended to allege in his first suit, the Court said that the provisions of section 24 can only practically be applied to causes where the record in the two suits is such as that by an inspection of the same court can determine as a matter of law, that the first was for the identical claim and cause of action set up in the second.

Defendant also urges that the relief provisions of the Limitations Act are not available to a party who does not act in good faith, and quotes from Sachs v. Ohio National Life Insurance Co., 131 F.2d 134, as follows: "The Act is remedial reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely because of procedural defect." Defendant's counsel argues that since plaintiff knew that defendant published a newspaper at Rockford, he must have known that its principal place of business was there, and therefore his action in the Federal court was not commenced in good faith. He suggests that plaintiff should have recommenced his case in the Federal court under the provisions of section 24, and that court, having the records in both cases before it, could have determined whether or not the causes of action were identical.

Since the Federal court on its own motion dismissed plaintiff's action for lack of jurisdiction, recommencement of the case in that court would have resulted only in another dismissal, the reason for dismissal of the first action being equally applicable to the second. It does not necessarily follow that defendant's principal place of business was in Rockford because it published a newspaper there, or that plaintiff did not act in good faith when he sued defendant in the Federal court under the mistaken belief that there was diversity of citizenship.

In its motion to dismiss filed in the trial court, defendant made no specific objection that the complaint failed to disclose facts upon which the court could determine that the complaint contains the same causes of action as those alleged in the Federal court. The statement in the motion "that plaintiff has not met nor conformed with the conditions provided in Chapter 83, Illinois Revised Statutes, Section 24(a) so as to permit the filing of an alleged new action", has no reference to the objection now urged. Section 42 (3) of the Civil Practice Act provides that all defects in pleading, either in form or substance, not objected to in the trial court, are deemed waived. Section 45 (1) of the Practice Act requires that all objections to pleading shall be raised by motion and that the motion shall point out specifically the defects complained of. By failing to specify this objection to plaintiff's complaint in its motion to dismiss filed in the trial court, defendant waived the objection, and it cannot be urged for the first time here. Gustafson v. Consumers Sales Agency, 414 Ill. 235.

Plaintiff alleged generally that his complaint in the Federal court contained the same causes as those alleged in the instant complaint. Section 24 of the Limitations Act specified no conditions to be met by a party seeking relief

thereunder, and it contains no express restriction or implication that such relief is limited to a party non-suited in a State court. In Wiehe v. Atkins, 126 Ill. App. 1, plaintiff recovered a judgment in the circuit court on appeal from a judgment rendered by a justice of the peace. The defense in the trial court and on appeal was that the suit was barred by limitations. However, transcripts were introduced by plaintiff showing that plaintiff had commenced a prior suit in justice court, that changes of venue were granted, and that the suit was dismissed on defendant's motion. On appeal defendant contended that the transcripts did not show that the prior suit was for the same cause of action, and that the identity of the causes could not be shown by oral evidence. The Court held that the dismissal was an involuntary nonsuit which extended the period of limitation, and in affirming the judgment, said: "Parol evidence of what occurred on a former trial, when pleadings are general, and this cannot be determined from the record, is always admissible. Wright v. Griffey, 147 Ill. 496, 500." In the Sachs case, cited by defendant, the Circuit Court of Appeals, Seventh Circuit, reviewed the Illinois decisions pertaining to the interpretation of "nonsuit" as used in section 24, and held that a dismissal for want of jurisdiction is clearly an involuntary dismissal and within the meaning of "nonsuit" as used in that section of the statute. The Court also said that such remedial statutes should be liberally construed, so as to prevent destruction of the purpose of the legislation.

It is our opinion that the provisions of section 24 of the Limitations Act afford relief for a plaintiff nonsuited in the Federal court, and that plaintiff's allegations with reference to the identity of the causes of action were sufficient when tested by the objections made in the trial court by defendant's motion. We therefore conclude that the Circuit

Court of Winnebago County improperly struck plaintiff's complaint, that the judgment in favor of defendant was erroneous, and that it should be and it hereby is reversed, and the cause remanded with directions to overrule defendant's motion to strike and dismiss plaintiff's complaint.

Reversed and remanded.

SMITH, P.J. and DOVE, J. Concur

SUPREME COURT, U. S.

FILED

JUL 30 1968

JOHN F. DAVIS, CLERK

No. 194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

CARSON PIRIE SCOTT & COMPANY, KROCH'S & BRENTANO'S, INC., THE FAIR, and RAY BRENNAN,

Petitioners,

v.

JOHN FACTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALBERT E. JENNER, JR.
PHILIP W. TONE
KEITH F. BODE
ROBERT E. PFAFF
Attorneys for Respondent, John Factor

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILL. 60618 LA keview 5-6581

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 194

CARSON PIRIE SCOTT & COMPANY, KROCH'S & BRENTANO'S, INC., THE FAIR, and RAY BRENNAN,

Petitioners,

v.

JOHN FACTOR,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondent prays that the Writ of Certiorari be denied.

REASONS FOR DENYING THE WRIT.

Petitioners have not demonstrated any grounds for the granting of the writ. In fact, this case is a classic example of a situation in which the writ should be denied.

1. This is an action for libel and invasion of right of privacy. Jurisdiction is predicated upon diversity of citizenship. The legal issues decided by the Court of Appeals

relate to the interpretation and applicability of Section 24 of the Illinois Limitations Act (Ill. Rev. Stat., 1967, Ch. 83, § 24a). The merits of the case (which have not been reached because of petitioners' success in diverting inquiry into the question of respondent's birthplace) are governed by state law. No question under the Constitution of the United States or any federal statute is involved.

2. There is no conflict among the circuits. Indeed, the only federal case cited by petitioners in which a plaintiff was barred on the "good faith" test which they and the trial court sought to impose upon respondent here, is *Hardin* v. *Cass County*, 42 Fed. 652 (W.D. Mo. 1890), an opinion interpreting a Missouri statute, which has not been cited for the proposition relied upon by petitioners in the 78 years since the case was decided.

3. No final judgment is involved. The Court of Appeals held that the District Court had erred in finding that respondent's cause of action was barred by an "implied" requirement of the Illinois Limitations Statute, and remanded the case for a trial on the merits.

4. The decision of the Court of Appeals rests on two alternative grounds, (a) that the trial court, in dismissing this action on grounds of limitations, misconstrued the Illinois Limitations Act, and (b) that, even assuming the correctness of the trial judge's interpretation of the Illinois statute, his findings that the evidence required dismissal were clearly erroneous. This Court, therefore, could not reverse unless it found that the Court of Appeals was wrong on both grounds.

5. The Court of Appeals, in remanding this case for a trial on the merits, acted consistently with the policy recently enunciated by the Illinois Supreme Court in construing Section 24 of the Limitations Act, *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 48, 203 N.E. 2d 415, 419 (1964), and with the policy of the Federal Rules of Civil

Procedure as construed by this Court (*Surowitz* v. *Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966)), to encourage the disposition of litigation on the merits.

6. Respondent's earlier action was filed in 1959. Petitioners, who are well aware that a cause of action for libel does not survive, have, since March, 1963, diverted the energies of court and counsel away from the merits and into an inquiry as to where respondent was born some 75 years ago. Granting of the writ would only serve to further delay a decision on the merits.

7. In addition to these considerations, the record shows that the Court of Appeals was correct in determining (a) that the trial court misconstrued Section 24 of the Illinois Limitations Act, and (b) that the trial court's findings of fact were clearly erroneous.

HISTORY OF THE LITIGATION.

Respondent's first action for libel and invasion of privacy was filed in the District Court in December, 1959, shortly after the publication of a book entitled "The Stolen Years," a partially ghost-written autobiography of the late gangster, Roger Touhy. Jurisdiction was predicated upon the "alienage" clause of Section 1332(a) of the Judicial Code, since petitioners were and are citizens of Illinois and respondent was then an alien, allegedly a British subject. In 1963 petitioners moved to dismiss the 1959 action on the ground of lack of jurisdiction. On December 24, 1964, the district court dismissed the action on the ground that the respondent had failed to sustain his burden of proving the existence of the jurisdictional facts. In the court's view the evidence tended to indicate that respondent was born in Russian Poland, rather than in Great Britain. It followed, under the court's interpretation of Russian law, that respondent was, at the time of the

filing of the action, a stateless person and therefore unable to invoke the jurisdiction of the federal court under the alienage provision. The court stated that the action was dismissed "with prejudice," even though, under Federal Rule 41(b), a dismissal solely on jurisdictional grounds clearly could not operate as an adjudication on the merits of respondent's causes of action.

Thereafter, on September 16, 1965, respondent filed the instant action. It is undisputed that respondent had become an American citizen in 1963 and that he was a resident of California. Consequently, it is conceded that federal jurisdiction exists on the basis of diversity of citizenship.

Petitioners moved to dismiss the action on a number of grounds, including that of limitations. (R. 9-10.) Since the 1959 action had been commenced within the one-year Illinois limitations period for libel and right of privacy actions, the right to refile was based on Section 24 of the Illinois Limitations Act, which provides in pertinent part:

> "In any of the actions specified in any of the sections of this act . . . if the plaintiff . . . shall be nonsuited, then, if the time limited for bringing such action shall have expired during the pendency of such suit, the plaintiff . . . may commence a new action within one year after such judgment . . . given against the plaintiff, and not after." (Ill. Rev. Stat., 1967, ch. 83, § 24a.)

It is undisputed: (a) that the original one-year limitation period expired during the pendency of the 1959 action; (b) that the dismissal of the 1959 action for lack of jurisdiction constituted a "nonsuit" under Section 24; and (c) that the case at bar had been filed within one year after the dismissal of the 1959 action. In short, respondent has satisfied every requirement expressed in Section 24. (R. 11, 26.)

Nevertheless, the district court held that respondent's action would be barred by limitations, unless he could show that he had acted in "good faith" in making the allegations contained in the complaint in the 1959 action. The district court held that this meant that respondent must have believed in good faith that he was born in Great Britain when he prosecuted the 1959 action. The court then summarily determined this "good faith" issue against respondent on the basis of the record in the trial on the issue of jurisdiction in the 1959 action and forthwith dismissed this action. (R. 10-14.)

When respondent filed a motion to vacate on the ground, among others, that the court had determined this factual question against respondent without a hearing (R. 14-15), the court consented to receive evidence. (R. 15-16.)

Thereafter, a hearing was held, but the district judge, over respondent's objection, imposed upon respondent the burden of disproving petitioners' charges of "bad faith" in connection with the 1959 action. (R. 30.) Respondent testified that prior to 1918 he had assumed, without being told, that, like his brothers and sisters, he had been born in Lodz, Russian Poland. (R. 332-333.) In 1918 or 1919 his parents told him for the first time that he had in fact been born in Hull, England while his parents were on a visit there. (R. 333.) Respondent's former attorney testified that in 1928 respondent had consulted him for the purpose of making a will and had informed him that he had been born in England. (R. 34-35.) Thereafter, the attorney had occasion to investigate the question of respondent's birthplace. He interviewed a number of respondent's relatives. The affidavits prepared as a result of this investigation were placed in evidence. They contained detailed statements by respondent's mother and three of his brothers (including Max Factor, the nationally

known cosmetics manufacturer) that plaintiff had been born in Hull, England, while his parents were there on a visit. (Pls.' Exs. 1-8; R. 63; 194-212.) Respondent's sister and his son and two nephews each testified that over the years, commencing with their childhood, their parents and other older members of the family had told them that respondent was born in England. (R. 76-77, 84-87, 112-113, 164-67, 184-86.) Respondent also introduced the affidavit of an Englishman, Solomon Schultz, prepared in 1928, which declared that he remembered the occasion of respondent's birth in England in about 1892. (Pl's. Ex. 9; R. 213.)

Petitioners relied entirely upon their attempted impeachment of respondent as a witness and upon a series of exhibits, several of which contained statements by respondent that he had been born in Russia. These were identified by respondent, who explained them by stating that they had been prepared during the time that he had mistakenly assumed that he, like the other members of his family, had been born in Russia. (R. 332.)

On October 20, 1966, the trial court entered findings (largely cast in the language of a set of findings submitted by petitioners' counsel), concluding that respondent had not satisfied the trial court's requirement of "good faith." On this basis the court decided that the respondent's claims were barred by limitations and dismissed the action. The court also stated, although estoppel had not been pleaded and was not an issue, that respondent was estopped from relying on Section 24. (R. 16-28.)

THE COURT OF APPEALS PROPERLY DETERMINED THAT SECTION 24 OF THE ILLINOIS LIMITATIONS ACT DOES NOT REQUIRE A PLAINTIFF TO DISPROVE CHARGES OF "BAD FAITH."

Petitioners' argument that the Court of Appeals misconstrued Illinois law is erroneous. It is undisputed that no Illinois court and (until this case) no federal court applying Illinois law, ever barred a plaintiff from refiling a nonsuited action under Section 24 of the Illinois Limitations Act on the ground that the plaintiff had not acted "in good faith" in making the allegations in the complaint in the prior nonsuited action. Yet this unprecedented penalty was imposed upon respondent by the trial court, and petitioners seek to have this Court approve it as the settled law of Illinois. There is no basis for petitioners' position.

It is conceded that respondent has diligently pursued his cause of action since it accrued in 1959. It is also undisputed that he has met every requirement set forth in Section 24 of the Illinois Limitations Act for the refiling of his earlier nonsuited action within the period of the Statute of Limitations.

Yet, the trial court, at petitioners' urging, superimposed a "good faith" requirement as an implied additional condition, allegedly on the basis of the "spirit" of the statute. This action of the trial court not only took unusual liberties with the provisions of a state statute, but also ignored the recent authoritative exposition of the "spirit" and purpose of that statute by the Illinois Supreme Court. In *Roth* v. *Northern Assurance Co., Ltd.*, 32 Ill. 2d 40, 203 N.E. 2d 415 (1964), the Illinois Supreme Court overruled one of its prior decisions and construed Section 24 to be applicable to the refiling of actions dismissed earlier for want of jurisdiction. The facts in the *Roth* case, in which a prior action in the federal district court had been dis-

missed for want of jurisdiction, would seem to have presented a serious question with respect to the "good faith" of the plaintiff in asserting federal jurisdiction in the earlier action. Yet the Illinois Supreme Court, in analyzing the purpose and scope of Section 24, made no effort to apply any "good faith" test to the actions of the plaintiff there. The Illinois Supreme Court described the purpose of Section 24 as follows (32 Ill. 2d at 48, 203 N.E. 2d at 419):

> "The plain purpose section 24 is to facilitate the disposition of litigation upon the merits and to avoid its frustration upon grounds that are unrelated to the merits."*

The Court also held, quoting with approval from other cases, that in a case involving a diligent plaintiff there was every reason to give a liberal, expansive interpretation to Section 24 (32 Ill. 2d at 49, 203 N.E. 2d at 420):

> " ' . . . Statutes of limitations, like other statutes, must be construed in the light of their objectives. The basic policy of such statutes is to afford a defendant a fair

---

* This policy is identical to the policy of the Federal Rules as set forth by this Court in *Surowitz* v. *Hilton Hotels Corporation*, 383 U.S. 363, 373 (1966), an opinion in which this Court made clear its distaste for a kind of requirement of proof of "good faith" prior to reaching the merits, which is analogous to the "good faith" hurdle which petitioners seek to impose here. The court stated (383 U.S. at page 373):

> " . . . The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits. . . . "

> opportunity to investigate the circumstances upon which liability against him is predicated while the facts are accessible . . . . "when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied." ' "

Since the "good faith" test imposed upon respondent by the trial court at petitioners' urging finds no support in the language or purpose of Section 24, and since it has never been applied by Illinois courts to bar any cause of action, the Court of Appeals was clearly correct in concluding that

> "we find no basis in law for holding that a plaintiff's reliance upon § 24 a *ipso facto* creates an issue of his good faith in doing so." *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 147 (7th Cir. 1968).

It is not surprising, therefore, that closer examination reveals that the alleged authority for the requirement of "good faith" which petitioners purport to find in Illinois law is, in fact, non-existent.

Petitioners assert that this alleged requirement was "established" in Illinois by the Seventh Circuit decision in *Sachs* v. *Ohio National Life Insurance Co.*, 131 F. 2d 134, 137 (7th Cir. 1942). That case liberalized existing interpretations of Section 24 by permitting the refiling of an action dismissed for want of jurisdiction, even though more than ten years had elapsed from the date when the original action was filed. The statement relied upon by petitioners is contained in the following quotation from the court's opinion dealing with the purpose of Section 24 (131 F. 2d at 137):

> "The act is remedial, reflecting a legislative intent to protect the party who brings the action in good faith from complete loss of relief on the merits merely

> because of procedural defect. Such remedial statutes should be liberally construed, so as to prevent destruction of the purpose of the legislation."

Since no issue of good faith was raised in that case, and since the court's decision was in favor of the right of the plaintiff to refile his action, the Court of Appeals in this case was obviously correct in describing the use of the isolated and unexplained words "good faith" in the above quotation as "obiter dictum." The mere quotation of the language from the *Sachs* opinion, set forth above, by later Illinois cases cannot reasonably be construed as the adoption of a requirement that a plaintiff prove his "good faith" in making the allegations contained in his earlier nonsuited action as a condition for being permitted to refile under Section 24.

In addition, petitioners rely upon two specific Illinois cases. Neither supports their position. *Tidwell* v. *Smith*, 57 Ill. App. 2d 271, 205 N.E. 2d 484 (2d Dist. 1965), involved, as the Court of Appeals noted, a plaintiff who

> "attempted to use § 24a after his self-initiated delay, which the court held constituted a virtual abandonment of his cause of action, rather than for the purpose of affording a fair opportunity to try the case on the merits. . . . " *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 148.

Even petitioners do not accuse respondent of lack of diligence in pressing for a trial on the merits.

The petitioners' last authority, *Lundstrom* v. *Winnebago Newspapers, Inc.*, 32 Ill. App. 2d 266, 177 N.E. 2d 643 (2d Dist. 1961), did not bar the plaintiff's refiling under Section 24. In response to a claim that the plaintiff had not acted in good faith in his earlier action, the court merely made the off-hand statement that "it does not necessarily follow" from the facts in the record "that

plaintiff did not act in good faith" in prosecuting the nonsuited action. Since the court did not indicate what would have been the "penalty" if bad faith had been found, and since the court did not remand for a hearing on the question of "good faith" even though there had been no hearing in the trial court, this off-hand comment can hardly serve to make the "good faith" test devised by petitioners an established doctrine in Illinois law.

Neither of these Illinois Appellate Court decisions is in any way inconsistent with the Illinois Supreme Court's controlling interpretation of Section 24 in the *Roth* case, *supra* (32 Ill. 2d 40, 203 N.E. 2d 415). The Court of Appeals correctly followed the *Roth* decision.

Furthermore, petitioners' assertion of the existence of a well established "good faith" exception to Section 24 ignores other Illinois cases dealing with refiling under Section 24. These cases establish that even though the dismissal was caused by inexcusable conduct on the part of plaintiff which prevented reinstatement of the original action, nevertheless the plaintiff may refile under Section 24, regardless of his fault in the prior action. *Patrick* v. *Burgess Norton Mfg. Co.*, 56 Ill. App. 2d 145, 205 N.E. 2d 643 (2d Dist. 1965); *Goldman* v. *City of Chicago*, 54 Ill. App. 2d 437, 441, 203 N.E. 2d 703, 705 (1st Dist. 1964); *Robertson* v. *Western Bearings Co.*, 50 Ill. App. 2d 173, 200 N.E. 2d 48 (1st Dist. 1964); *Wright* v. *Chicago Transit Authority*, 43 Ill. App. 2d 408, 193 N.E. 2d 597 (1st Dist. 1963) (abstract opinion); *Gleason* v. *Brazauskas*, 70 Ill. App. 2d 276, 217 N.E. 2d 298 (1st Dist. 1966) *Parkinson* v. *Hill*, 66 Ill. App. 2d 405, 214 N.E. 2d 347 (1st Dist. 1966) (abstract opinion); *Parks* v. *City of Chicago*, 50 Ill. App. 2d 100, 199 N.E. 2d 830 (1st Dist. 1964) (abstract opinion); *Sehnert* v. *Schipper & Block, Inc.*, 168 Ill. App. 245 (2d Dist. 1912). There is no inquiry

into (and indeed no judicial interest in) the question of whether plaintiff's inexcusable conduct has been caused by negligence or by bad faith. It is impossible to explain the opinions in all these cases upon the assumption that a requirement of proof of the "good faith" of the allegations in the complaints in the nonsuited actions lurks unexpressed in the background.

The frequent occurrence in Illinois of dismissals and of refilings under Section 24 also reveals a serious and harmful effect which adoption of the trial court's "good faith" requirement would have upon Illinois practice. Every refiling under Section 24 results from some kind of default, neglect or error in the prior action. If court decisions were to establish as a pre-condition for refiling that plaintiffs have acted "in good faith" in making the allegations in their complaints in the prior nonsuited actions, the plaintiff's "good faith" would be challenged in virtually every refiled action. It is obvious that the resulting preoccupation of the time of court and counsel with this type of collateral inquiry into a plaintiff's state of mind would be subversive and destructive of the purposes of Section 24 and of the public policy favoring the disposition of litigation on the merits.

THE COURT OF APPEALS PROPERLY REVERSED THE DISTRICT COURT'S FINDINGS OF FACT AS "CLEARLY ERRONEOUS."

Petitioners attempt to torture their disagreement with the alternative ground of the Court of Appeals decision which finds the district court's factual conclusions to be clearly erroneous into an important legal question amounting to a departure "from the accepted and usual course of judicial proceedings." This is nonsense. There is no assertion that the Court of Appeals for the Seventh Circuit has adopted improper standards for review of lower court deci-

sions. Even a cursory examination of the recent decisions of that Court reveals repeated affirmances based in part upon the principles of Fed. R.Civ.P. 52(a). See, e.g., *A.L.B. Theatre Corp.* v. *Loew's, Inc.*, 355 F. 2d 495, 499 (7th Cir. 1966) (Pet. p. 8); *Ryan* v. *Intern'l. Brotherhood of Electrical Workers*, 387 F. 2d 778 (7th Cir. 1967), both affirmances of decisions by the same trial judge who rendered the findings in this case.

Of course, Rule 52(a) does not require a Court of Appeals to accept automatically any findings of fact made by a trial court. This Court made that clear in enunciating the standards which have been followed in the review of judges' decisions by the federal courts, both before and after the adoption of the Federal Rules:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. *A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.*" *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). (Emphasis supplied.)

Petitioners themselves concede the correctness of the proposition that a Court of Appeals may reject findings which are "manifestly against the weight of the evidence." (Pet. p. 8) *Metalexport Co.* v. *Gen-O-Ral Processing Corp.*, 365 F.2d 178, 180 (7th Cir. 1966).

The Court of Appeals followed these standards in the case at bar. As the Court stated (*Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 150):

> "Actually we must realistically face a situation where, in order to sustain the district court's findings

> herein, it would be necessary for us, not merely to disregard the mass of evidence in this record tending to support plaintiff's contention, but also to implicitly conclude that the witnesses and affiants, by which such evidence has been established, are unworthy of belief, either because of perjury or an amazing incapacity to remember important matters of family pedigree."

In other words, the Court of Appeals concluded that the findings were manifestly against the weight of the evidence and left the reviewing court with the definite and firm conviction that a mistake had been committed. Those conclusions of the Court of Appeals were clearly justified.

Before even reaching an examination of the evidence, it is obvious that the findings contain a number of fundamental flaws which destroy their value and weight. First, as the Court of Appeals noted (*Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 143, 147-48), the trial court erroneously placed the burden of proof upon respondent.*

Petitioners argue as a separate point (Pet. p. 13), without the citation of any authority, that the Court of Appeals should have cured the error caused by the improper allocation of the burden of proof by remanding the case to the trial court for new findings of fact. This suggestion makes no sense. The Court of Appeals, as an alternative ground for its decision, concluded that the trial court had misinterpreted Section 24 of the Illinois Limitations Act and therefore that the entire issue upon which evidence had been received was immaterial. Furthermore, the other errors in the findings of fact and defects in petitioners' proof in the trial court required reversal. Petition-

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* In doing so the trial court made no reference to the "burden of persuasion"—"burden of going forward" distinction (Pet. p. 12, n. 11) suggested for the first time by petitioners in their brief in the Court of Appeals. (R. 30-31.)

ers have never suggested, until the filing of their petition for certiorari in this Court, that the case should be remanded for new findings of fact. The diversion of the energies of court and counsel into inquiries relating to respondent's birthplace have gone on long enough. The time has come to proceed with the merits of the case without further delay.

Second, the trial court invoked against the respondent the doctrine of estoppel although that defense had not been pleaded and although petitioners admitted on the appeal that it was not an issue in the case. *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 146-147, 150.

Third, in order to prove their oft-repeated charge and to sustain the trial court's finding that respondent was "guilty of perpetrating a fraud in an effort to create a basis for Federal jurisdiction" (Pet. p. 18), petitioners would have had to prove (1) that respondent had knowledge of the Soviet law which denied him Russian citizenship even though he had been born in Russian Poland; (2) that respondent knew that he was a stateless person; and (3) that he believed that a stateless person could not invoke federal jurisdiction under the alienage clause of 28 U.S.C. §1332. Petitioners introduced no evidence whatever to prove any of these critical contentions. Yet the trial court wholly overlooked this defect and ignored the entire question in his findings of fact.

Turning from these threshold defects to a consideration of the evidence in the record, the fatal flaw in the trial court's findings and in petitioners' reasoning is that both necessarily presuppose a wholesale conspiracy to commit perjury on the part of a large number of witnesses and affiants whose testimony has not been impeached in any way. The Court of Appeals noted this in the passage quoted above.

Petitioners emphasize chiefly the trial court's disbelief of respondent as a witness, but the bulk of respondent's evidence consisted of exhibits, testimony and affidavits from persons living and dead who were not impeached and who categorically corroborated respondent's testimony that he was born in Great Britain.

The decision of the Court of Appeals was based upon the virtual absence of any affirmative evidence from petitioners and upon the impossibility of disregarding this mass of unimpeached evidence.

Petitioners ask this Court to follow the trial court in disregarding the sworn statements and testimony, not only of respondent, but also of Max Factor (the nationally known cosmetics manufacturer), Nathan Factor, Daniel Factor, Leah Factor, Dena Lupu, Jerome Factor, Monte Factor, Ted Factor, Solomon Schultz, George Gayle Gilbert, Jr. and Max Swiren. Since the testimony and recollection of these witnesses and affiants with respect to the critical matter of respondent's birthplace was clear and definite, none of this testimony can be explained away on the theory of mistake. These witnesses and affiants were either telling the truth or committing deliberate perjury. Since the record contains no evidence to impeach their veracity, the trial court's acceptance of a theory of wholesale perjury was clearly erroneous.

Petitioners seek to rehabilitate the trial court's findings by contending that attorneys Gilbert and Swiren, respondent's son, Jerome Factor, and respondent's nephews, Monte Factor and Ted Factor, need not have been lying because their testimony consisted of repeating what they had been told by members of the Factor family who are

now deceased.* Of course, all pedigree evidence is of this character, especially where, as here, the event being inquired into occurred many years ago so that all eyewitnesses are dead. But, apart from that factor, petitioners' revised theory only serves to require them to espouse an even more incredible version of the facts.

If Messrs. Gilbert and Swiren were not lying, then, according to petitioners' theory, respondent lied to Mr. Gilbert when he consulted him for the purpose of making a will in 1928. As the Court of Appeals properly noted, "On such an occasion a man would ordinarily have no conceivable purpose for concealing the place of his birth." *Factor* v. *Carson, Pirie Scott & Co.*, 393 F.2d 141, 150. Further, respondent's mother would have had to lie successfully to attorney Swiren and respondent's brothers to attorney Gilbert in a whole series of interviews.

Similarly, the notion that the testimony of respondent's nephews, Monte Factor and Ted Factor, and respondent's son, Jerome Factor, can be explained away on the ground that they received false information from respondent and his brothers and sisters presupposes a fantastic conspiracy on the part of respondent's family which required respondent's brother and sister-in-law, Nathan and Rose Factor, to lie repeatedly to their minor children and nephew in the family home in the 1920's; required respondent to lie to his young son and required respondent's sister Gussie to lie to her nephew, while he was visiting in her store in about 1926.

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* This argument, of course, weakens the force of petitioners' insistence upon the trial court's right to disbelieve witnesses on the basis of their demeanor, since Jerome Factor and George Gilbert were the only witnesses, other than respondent, whose demeanor the trial judge had an opportunity to observe.

Petitioners make an effort to support the trial court's rejection of the mass of evidence adduced by respondent by suggesting that the witnesses had motives to falsify. These arguments were thoroughly canvassed in the briefs in the Court of Appeals and have no merit. They are predicated largely upon a classic example of circular reasoning or "bootstrapping". Petitioners contend that respondent and all of the members of his family lied for forty years inside and outside the family in order to protect respondent from prosecution for fraudulently obtaining a British passport. But the record contains no evidence whatsoever to support the conclusion that the respondent's British passport was fraudulently obtained. Petitioners' theory is based upon the *assumption* that the "fraud" consisted of respondent's assertion that he was born in Great Britain whereas he knew for a fact that he was born in Russian Poland. However, the "fact" thus assumed by petitioners (respondent's "bad faith" in asserting that he was born in Great Britain) was the precise fact that they had undertaken to *prove* in order to sustain their burden of proof.

In addition to its circularity, the "fraudulent passport" theory is predicated upon the assumption that respondent was forced to adopt the complicated ruse of fabricating a British birthplace because it was the only possible way for him to obtain a passport after the Russian Revolution of 1917. But, even if one were to assume the truth of the petitioners' contentions concerning respondent's birthplace, he could have avoided the false dilemma posed by the petitioners by the simple process of securing American citizenship (for which he was eligible on the basis of eleven years of residence in the United States) and obtaining a passport as an American citizen.

Whether petitioners' theory is that all of the witnesses and affiants whose testimony was presented on behalf of the respondent were perjurers or that 80% were perjurers who engaged in an amazingly thorough 40-year conspiracy to deceive the others, the contentions are incredible and any findings based upon them could not stand.

CONCLUSION.

Both of the alternative grounds of the Court of Appeals' decision are in accordance with the provisions and policies of the Federal Rules and with the letter and purpose of the applicable Illinois law. The petition should be denied so that the case may return to the district court and there, at long last, proceed to a hearing on the merits of the complaint.

Respectfully submitted,

ALBERT E. JENNER, JR.
PHILIP W. TONE
KEITH F. BODE
ROBERT E. PFAFF
Attorneys for Respondent,
John Factor.

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Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 South LaSalle Street
Chicago, Illinois 60603